Supreme Court, U.S.
FILED

931250 JAN 31 1994

OFFICE OF THE CLERK

No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and OTHERS SIMILARLY SITUATED,
Petitioners,

v.

THE CITY OF DALLAS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

GENICE A.G. RABE
Counsel of Record
L.N.D. WELLS, JR.
Suite 1202
600 E. Las Colinas Boulevard
Irving, Texas 75039-5606
(214) 556-2999
Counsel for Petitioners

January 31, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

148 PP

QUESTIONS PRESENTED

1. Official City of Dallas policy denied promotions and caused demotions of visually impaired and insulin dependent diabetic Plaintiffs and class members in alleged driving positions. The district court found that under the Rehabilitation Act these impairments were handicaps, that Plaintiffs were otherwise qualified, and that the City must determine on an individual basis whether class members were otherwise qualified. The court of appeals reversed and rendered finding that Plaintiffs and class members were neither handicapped nor, as a matter of law, otherwise qualified and that class injunctive relief was improper.

A. Are visual deficiencies and insulin dependent diabetes handicaps both as handicaps per se and where the employer regards them as handicaps.

B. Should determinations of whether a handicapped person is otherwise qualified be made on an individual basis, not a categorical holding that, as a matter of law, he is a safety risk.

C. Was class injunctive relief requiring that the City make individual determinations of whether handicapped employees were otherwise qualified proper.

D. Did the court of appeals violate the clearly erroneous rule by reversing the district court's unchallenged factual findings including that Plaintiffs were handicapped and otherwise qualified.

2. Whether due process requires that a person deprived of a property interest in his job through demotion be allowed to present evidence of the reasons he alleges caused his demotion including the employer's discrimination against him.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below include those named in the caption of this petition. In addition, the district court certified two subclasses represented by Plaintiffs: All City of Dallas employees who have diabetes mellitus requiring insulin for control and who have visual impairments.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	6
A. Course of Proceedings and Disposition	6
B. Statement of Facts	9
1. Administrative Directive 3-3	9
2. The Plaintiffs Lyle Chandler and Adolphus Maddox	10
3. The Class	13
REASONS FOR GRANTING THE WRIT	13
I. THE QUESTIONS PRESENTED ARE IMPORTANT	14
II. THE COURT OF APPEALS' DECISION CONFLICTS WITH SUPREME COURT AND OTHER COURTS OF APPEALS' PRECEDENT	17
A. Handicapped Status	17
B. Otherwise Qualified	21
C. Class Certification	25
D. Due Process	26

TABLE OF CONTENTS—Continued

Page

III. IT IS NECESSARY THAT THIS COURT EXERCISE ITS SUPERVISORY POWERS 27

CONCLUSION 29

LIST OF APPENDICES

Appendix A

Court of Appeals Opinion filed September 20, 1993, 2 F.3d 1385 (5th Cir. 1993) 1a

Appendix B

District Court Findings of Fact and Conclusions of Law filed September 10, 1992 ..... 22a

Appendix C

District Court Order Reinstating Judgment filed September 10, 1992 ..... 69a

Appendix D

District Court Judgment filed April 29, 1991 ..... 70a

Appendix E

Court of Appeals Opinion filed April 9, 1992, 958 F.2d 85 (5th Cir. 1992) 75a

Appendix F

District Court Order Denying Stay of Judgment filed September 10, 1992 ..... 86a

Appendix G

Court of Appeals Order Granting Stay of Injunctive Relief Pending Judgment filed July 16, 1993.... 88a

TABLE OF CONTENTS—Continued

Appendix H — Page

District Court Memorandum Opinion and Order filed November 4, 1986 ..... 89a

Appendix I

District Court Order of Class Certification filed April 26, 1989 ..... 96a

Appendix J

Court of Appeals Denial of Petition for Rehearing and Suggestion for Rehearing En Banc filed November 2, 1993, 9 F.3d 105 (5th Cir. 1993) 98a

Appendix K

Excerpts from Federal Regulations Concerning the Rehabilitation Act 100a

Appendix L

EEOC Regulations Concerning the Americans with Disabilities Act 103a

Appendix M

Federal Motor Carrier Safety Regulations 105a

Appendix N

Issues of the City of Dallas on Appeal 108a

TABLE OF AUTHORITIES

CASES Page

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 27
Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993) 19
Bentievegna v. Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) 19, 23
Brown v. County of Genesee, 37 F.E.P. 1595 (D.C. Mich. 1985) 19
Chalk v. U.S. Dist. Court, Cent. Dist. of California, 840 F.2d 701 (9th Cir. 1988) 23
Chandler v. City of Dallas, 958 F.2d 85 (5th Cir. 1992) 2, 7, 28
Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), reh'g den'd, 9 F.3d 105 (1993) ..... *passim*
Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991) 19, 23
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 27
Colorado Civil Rights Comm'n v. North Wash. Fire Prot. Div., 772 P.2d 70 (Colo. 1988) 19
Commonwealth Dep't of Transp. v. Tinsley, 564 A.2d 286 (Pa. Commw. Ct. 1989), *All. den'd*, 575 A.2d 570 (Pa. 1990) 19
Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights and Oppor., 405 A.2d 618 (Conn. 1978) 19
Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) 15
Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993) 23
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 27
Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989) 19
Dep't of Labor v. Texas Instruments, 80 OFC-28, 47 F.E.P. 18 (June 7, 1988) 23
E.E. Black Ltd. v. Marshall, 497 F. Supp. 484 (D.C. Haw. 1980) 23
Frito-Lay v. Wisconsin Labor & Ind. Rev. Comm'n, 290 N.W.2d 551, (Wis. Ct. App. 1980), *aff'd*, 303 N.W.2d 668 (Wis. 1980) 19

TABLE OF AUTHORITIES—Continued

	Page
Greenwood v. State Police Training Ctr., 606 A.2d 336 (N.J. 1992)	19
Jackson v. Maine, 544 A.2d 291 (Me. 1988), *cert. den'd*, 491 U.S. 904 (1989)	19
Johnson v. Mayor of Baltimore, 472 U.S. 353 (1985)	24
Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990)	23
Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985)	23
Miller v. Sioux Gateway Fire Dep't, 497 N.W.2d 838 (Iowa, 1993)	19
Norris v. St. Joseph Hospital, 1993 U.S. App. LEXIS 11991 (4th Cir. 1993)	19
O.F.C.C.P. v. Norfolk & Western R.R. Co., Case No. 90-OFC-1 (June 26, 1991)	19
Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981)	17, 19
Pullman-Standard v. Swint, 456 U.S. 73 (1982)	27
School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)	*passim*
Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2nd Cir. 1989)	19
Stratie v. Dep't of Transp., 716 F.2d 227 (3rd Cir. 1983)	23
Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1985)	27
Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985)	24
Wood v. Omaha School Dist., 985 F.2d 437 (8th Cir. 1993)	19

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I	5, 6, 13, 28
U.S. Const. amend. XIV, § 1	5, 6, 13, 28

STATUTES, REGULATIONS AND RULES

28 U.S.C. § 1254	2
28 U.S.C. § 1331	6

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 1343 6
28 U.S.C. § 2201 6
28 U.S.C. § 2202 6
29 U.S.C. § 701 *et seq.* (Rehabilitation Act) ..... *passim*
42 U.S.C. § 1983 6
42 U.S.C. § 1988 6
42 U.S.C. § 12101 *et seq.* (Americans with Disabilities Act) ..... *passim*
28 C.F.R. § 42 (1993) 4, 20
29 C.F.R. § 32 (1993) 4, 20
29 C.F.R. § 1630 (1993) 5, 20
40 C.F.R. § 7 (1992) 4, 20
41 C.F.R. § 60-741 (1993) 4, 20
45 C.F.R. § 84 (1992) 4, 20
49 C.F.R. §§ 390 and 391 (1992) 5, 10, 24
57 Fed. Reg. 10295 (March 25, 1992) (to be codified at 49 C.F.R. § 391) 5, 10, 24
58 Fed. Reg. 40690 (July 29, 1993) (to be codified at 49 C.F.R. § 391) 5, 10, 24
City of Dallas Administrative Directive 3-3 ..... *passim*
Fed. R. Civ. Proc. 23(b)(2) 6, 8, 25
Fed. R. Civ. Proc. 52(a) 27, 28
Tex. Rev. Civ. Stat. Ann. art. 5221(k) (Texas Commission on Human Rights Act) 8, 13

LEGISLATIVE HISTORY

123 Cong. Rec. 13,515 (May 4, 1977) 14
H. Rep. No. 485(III), 101st Cong., 2nd Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 455 ..... 15, 22
S. Rep. No. 357, 102nd Cong., 2nd Sess., *reprinted in* 1992 U.S.C.C.A.N. 3712 15
S. Rep. No. 1297, 93rd Cong. 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373 ..... 14, 18, 22

BOOKS AND PUBLICATIONS

Mark L. Bayler, *Dulling a Needle: Analyzing Federal Employment Restrictions on People with Insulin Dependent Diabetes*, 67 Ind. L.J. 1067 (1992) 23

TABLE OF AUTHORITIES—Continued

Page

Anna Phipps Engh, Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 Wm. & Mary L.R. 149 (1988) 15

Dep't of Health and Human Services, Diabetes in the United States: A Strategy for Prevention (1993) 16

Ingrid Libman et al, *How Many People in the U.S. Have IDDM?*, 16 Diabetes 841 (1993) 16

Bonnie P. Tucker, *Section 504 of the Rehabilitation Act after Ten Years of Enforcement: The Past and the Future*, 4 U. Ill. L. Rev. 845 (1989) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and OTHERS SIMILARLY SITUATED,
Petitioners,

v.

THE CITY OF DALLAS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

We, Lyle S. Chandler, Adolphus A. Maddox, and others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals reversing and rendering and from which Petitioners apply for writ of certiorari is reported at 2 F.3d 1385 (5th Cir. 1993) and attached in the Appendix ("App.") at 1a-21a. The court of appeals' denial of Petitioners' timely motion for panel rehearing and suggestion of rehearing *en banc* (App. 98a-99a) is reported at 9 F.3d 105 (5th Cir. 1993). The

district court's Findings of Fact and Conclusions of Law and Order Reinstating Judgment entered on September 10, 1993, which were reversed on appeal in 1993, are not reported, but are reproduced at App. 22a-68a and 69a-74a, respectively.

There were earlier judgments in this case. The first opinion of the court of appeals that vacated judgment and remanded for further findings of fact and conclusions of law is reported at 958 F.2d 85 (5th Cir. 1992) (App. 75a-85a). The previous judgment of the district court is not reported, but is reproduced at App. 70a-74a.

Finally, the district court's Memorandum Opinion and Order largely denying Defendant City's Motion for Summary Judgment entered November 4, 1986, is attached at App. 89a-95a, and the district court's April 26, 1989, Order of Class Certification is included at App. 96a-97a.

JURISDICTION

Petitioners seek review of the judgment and opinion of the Fifth Circuit Court of Appeals entered on September 20, 1993. The Petitioners' timely petition for panel rehearing and suggestion for rehearing *en banc* were denied on November 2, 1993. This Petition is timely filed. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Rehabilitation Act

The relevant portions of the Rehabilitation Act, 29 U.S.C. § 701, *et seq.* include:

§ 701 Findings; Purpose; Policy

(b) Purpose

The purposes of this chapter are—

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through—

. . .

(F) the guarantee of equal opportunity.

§ 706 Definitions

(8)(B) . . . the term "individual with a disability" means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

§ 794 Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

City of Dallas Administrative Directive 3-3

City of Dallas Administrative Directive 3-3, "Driver Safety Program," provides in relevant part:

5.2. A Primary Driver shall NOT be certified to operate a vehicle for the City of Dallas if they [sic]:

c. Do not meet the physical standard for the certification.

5.4. A person may be physically certified every two years to operate a vehicle for the City of Dallas if they [sic]:

c. Have no established medical clinical history or medical diagnosis of diabetes mellitus currently requiring insulin for control.

j. Have distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

Federal Regulations

Federal Regulations applying the Rehabilitation Act include:

Non-Discrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance (Dep't of Health and Human Services), 45 C.F.R. § 84 (1992);

Obligations of Contractors and Subcontractors for Handicapped Workers (Office of Federal Contract Compliance Programs), 41 C.F.R. § 60-741 (1993);

Non-Discrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. § 7 (1992);

Non-Discrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance (Office of the Sec. of Labor), 29 C.F.R. § 32 (1993);

Non-Discrimination; Equal Employment Opportunities; Policies and Procedures (Dep't of Justice), 28 C.F.R. § 42 (1993).

The applicable portions of such regulations are reproduced at App. 100a-102a.

Relevant sections of the Regulations of the Equal Employment Opportunity Commission (EEOC) to Implement the Equal Employment Provisions of the Americans with Disabilities Act (ADA) and EEOC's Interpretative Guidance on Title I of the ADA, 29 C.F.R. § 1630 (1993), are reproduced at App. 103a-104a.

Relevant portions of the Fed. Motor Carrier Safety Regulations (Fed. Highway Admin., Dep't of Transp.), 49 C.F.R. §§ 390 and 391 (1992), are reproduced at App. 105a-106a. The Dep't of Transp. waiver provisions for interstate drivers with insulin dependent diabetes and visual deficiencies appear at 58 Fed. Reg. 40690 (July 29, 1993) and 57 Fed. Reg. 10295 (Mar. 25, 1992) (to be codified at 49 C.F.R. § 391). Portions are again reproduced at App. 106a-107a.

Constitutional Provisions

The First Amendment to the Constitution of the United States is:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the Constitution of the United States states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

Plaintiffs filed this case in 1985 on behalf of themselves and a proposed class of City of Dallas employees who were barred from city jobs under City of Dallas Administrative Directive 3-3 (AD3-3). AD3-3 bars from approximately four thousand (4,000) "primary driving" jobs in one hundred thirty-eight (138) different job classifications persons with a host of impairments, including diabetes mellitus requiring insulin for control and visual deficiencies. Plaintiffs claimed that the City denied them promotion, opportunity for promotion, and limited them in performance of their positions because of their physical disabilities or perceived physical disabilities.[1] They also claimed that they had been retaliated against, disciplined, and demoted because of their opposition to AD3-3. They alleged that these acts violated the Rehabilitation Act and the Texas Commission on Human Rights Act. They also alleged violation of their constitutional rights to free speech, due process, and equal protection.

The jurisdiction of the district court was invoked under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*; the First and Fourtenth Amendments to the United States Constitution; 28 U.S.C. §§ 1331, 1343, 2201, 2202; and 42 U.S.C. §§ 1983 and 1988.

In March 1989 the district court held a class certification hearing and certified two subclasses: a diabetes subclass and a visual deficiency subclass. The district court held that AD3-3 defined the class and provided the basis of a Rule 23(b)(2) class for injunctive relief only.

---

[1] Effective October 29, 1992, the Rehabilitation Act was amended to incorporate the language and standards of the Americans with Disabilities Act. One change was to replace the term "handicapped" with the term "disabled." P.L. No. 102-569 (codified as amended at 29 U.S.C. § 706(8)). The terms are used interchangeably in this Petition.

The case was tried to the district court August 6 through 10, 1990. On April 29, 1991, Judgment was entered for Plaintiffs and class members.

The City appealed. The Fifth Circuit vacated the Judgment and remanded for findings of fact and conclusions of law particularly on the issues of whether Plaintiffs were handicapped and otherwise qualified under the Rehabilitation Act. The court explained that it needed detailed findings to apply the clearly erroneous standard of review. *Chandler v. City of Dallas,* 958 F.2d 85 (5th Cir. 1992).

On September 10, 1992, the district court entered fifty-two (52) pages of Findings of Fact and Conclusions of Law (Findings and Conclusions) and an Order Reinstating Judgment.[2] The district court specifically found that Plaintiffs and class members were handicapped because Administrative Directive 3-3 treats them as handicapped by denying them "primary driving" positions solely on the bases of their diabetes and visual deficiencies. It also found that they were handicapped because their diabetes and visual deficiencies impaired their major life activities including securing, retaining, and advancing in employment. It held that Plaintiffs were handicapped according to federal regulations, case law, the City's own actions and admissions, and common sense. The district court also explained that its findings were based on its determinations that the testimony of Plaintiffs and their four medical experts (two endocrinologists, a vision expert, and a psychologist) was worthy of belief and that the testimony of the City's sole medical expert and many of its supervisors and managers was not. The district court relied on the credited medical testimony, the Plaintiffs' work and driving histories, and other evidence to find that Plaintiffs were otherwise qualified. Based on its findings the district court concluded that the City had violated

---

[2] App. 22a-74a.

the Rehabilitation Act and the Texas Commission on Human Rights Act.

The district court found that Chandler was unlawfully demoted to T-7 Electrical Repairer, denied promotions to the positions of T-10 Electrical Repairer in 1985 and Water Maintenance Supervisor 13 in 1989, and due back pay exceeding $79,000.00. Similarly, the district court directed that the City had unlawfully denied Maddox promotion to T-9 Plant Mechanic in 1985 and that he was due over $27,000 in back pay.

The district court also held that the City, "the party opposing the class," had, with respect to AD3-3, "acted or refused to act on grounds generally applicable" to the two subclasses, thereby making injunctive relief appropriate to prevent the discriminatory application of AD3-3 under Fed. R. Civ. Proc. 23(b)(2). It required that the City stop discriminating against its employees on the basis of their handicaps, diabetes and visual deficiencies, without proof that each individual excluded from "primary driving" positions was a safety risk.

The district court also held that the City had denied to Plaintiffs their constitutional rights to free speech, due process and equal protection for claims distinct from their handicap discrimination claims. It found that the City had demoted and threatened Plaintiffs for their speech, violated Chandler's right to due process by denying him opportunity to present evidence during his appeal of his demotion that it was discriminatory and retaliatory, and violated the Plaintiffs' equal protection rights because there was no rational basis for the City to discriminate against them because of their handicaps. The district court awarded Chandler over $100,000.00 and Maddox over $25,000.00 in damages for these violations.

The City again appealed, although it did not claim that the district court's findings of fact were clearly erroneous.[3]

---

[3] See Issues of the City of Dallas on Appeal, App. 108a.

The court of appeals reversed and rendered on September 20, 1993. The court held that Plaintiff Adolphus Maddox who had uncorrectable vision in his left eye was not handicapped and that, as a matter of law, persons with diabetes mellitus requiring insulin for control and visual deficiencies are not otherwise qualified. The Fifth Circuit concluded that diabetes was not itself a handicap and that it need not reach a final conclusion as to whether the City treated insulin dependent diabetics as handicapped thereby making them handicapped for purposes of the Rehabilitation Act, because of its conclusion that they, as a matter of law, were not otherwise qualified. The Fifth Circuit held that class certification was improper. It summarily concluded that Plaintiffs' right to free speech, due process, and equal protection had not been violated.[4]

The court of appeals denied Plaintiffs' motion for panel rehearing and suggestion for rehearing *en banc*.

B. Statement of Facts

The facts are detailed in the district court's Findings of Fact and Conclusions of Law.[5] The findings were not challenged on appeal. We urge this Court to examine those findings. The Petitioners summarize the basic facts below.

1. ***Administrative Directive 3-3***

The City issued AD3-3 in 1978 and has amended it numerous times.[6] AD3-3 has provided that employees could not be certified for "primary driving" positions if

---

[4] The panel did not address the district court's determination that the City retaliated against Plaintiffs in violation of the Rehabilitation Act. It, however, reversed this holding by its order reversing and rendering.

[5] App. 22a-68a.

[6] The City Manager issued AD3-3 on June 5, 1978. It was amended March 15, 1981; reissued May 17, 1984; reissued January 1, 1986; and amended effective October 1, 1989.

they had certain specified health conditions including diabetes mellitus requiring insulin for control and visual deficiencies.

The physical restrictions of AD3-3 were copied from Department of Transportation (DOT) physical standards for over-the-road drivers of large vehicles. These DOT regulations have no application to city driving or to vehicles weighing 10,000 pounds or less,[7] the kind of driving and vehicles most commonly involved in city driving.[8] AD3-3 also does not include waiver provisions found in the DOT standards for insulin dependent diabetes and visual deficiencies.[9]

2. *The Plaintiffs Lyle Chandler and Adolphus Maddox*

Lyle Chandler was hospitalized and diagnosed with diabetes mellitus in 1977. He has Type I diabetes meaning that he has to use insulin to control his diabetes. The City hired Chandler in 1981 as a T-9 Electrical Repairer with knowledge of his diabetes. He drove in this position from the date of his hire until early 1985 when the City removed him from driving because of his diabetes in accord with AD3-3.

Chandler was not allowed from late 1984 to apply for promotion to any other position covered by AD3-3 including T-10 Electrical Repair Supervisor. He also unsuccessfully sought promotion to the position of Water Maintenance Supervisor 13. The position of T-7 Electrical Repairer, T-9 Electrical Repairer, T-10 Electrical Repair Supervisor, and Water Maintenance Supervisor 13 are in a line of progression as defined by the City.[10]

---

[7] 49 C.F.R. §§ 390.3(a) and 390.5, App. 105a.

[8] Plaintiff Chandler testified that he drove a delivery van approximately five (5) hours per week in his positions as T-9 and T-7 Electrical Repairer. Tr. 17, pp. 31-32.

[9] 58 Fed. Reg. 40690 (July 29, 1993); 57 Fed. Reg. 10295 (March 25, 1992).

[10] Pls.' Trial Exs. 47-48.

Within three months of filing suit Chandler was demoted to T-7 Electrical Repairer with a corresponding decrease in salary. The City also threatened him with discharge and told him not to discuss his claim of discrimination with anyone. Chandler administratively appealed his demotion, but at hearing was denied any opportunity to present evidence that his demotion was discriminatory and retaliatory.

All medical evidence at trial was that Chandler's diabetes was well controlled and that he is and was capable of safely driving in his employment. Endocrinologists Philip Raskin, M.D., a nationally recognized expert and prolific author, and Stephen Aranoff, M.D., Chandler's treating physician, testified that Chandler's diabetes is controlled, has been controlled, and that he is fully capable of driving in his employment.[11] Plaintiffs also entered as an exhibit the report of the City's previously identified medical expert to such effect.[12] Dr. Raskin and the City's physician, Mary Jane Kelly, M.D., testified that persons with diabetes are widely discriminated against in their employment.[13] During his City employment Chandler has had no traffic accident and no accident caused by insulin reactions.

In childhood Adolphus Maddox was hospitalized because of an accident that permanently affected the vision in his left eye. His left eye vision of 20/60 cannot be corrected. With both eyes Maddox's vision is 20/15.

The City hired Maddox in 1982 and with knowledge of his visual impairment allowed him to drive in his posi-

---

[11] Tr. 19, pp. 21-23, 50-51; Tr. 21, pp. 7-11, 13.

[12] Report by Dr. Mark Leshin, Pls.' Trial Ex. 139. The City had designated Dr. Leshin as its medical expert in pre-trial materials, had Dr. Leshin examine and file a written report on Plaintiff Chandler, but did not present him as a witness at trial. Indeed, the City presented no witness to testify on diabetes or Chandler's medical condition and control of his diabetes.

[13] Tr. 21, pp. 17, 24, 26; Tr. 14, pp. 17, 22-23.

tion of Plant Mechanic T-7 from 1982 through 1985. In 1985, the City removed him from driving because his vision in his left eye did not meet the requirement of AD3-3 that vision in each eye be corrected to at least 20/40.

Plaintiff Maddox has been denied promotion and opportunity to promote since 1985 to any of the City's 4,000 "primary driving" positions including the position of Plant Mechanic T-9, the next position in the line of progression for a Plant Mechanic T-7.

In response to Maddox's complaints of restriction and non-promotability, his supervisors told him that he would never be promoted and threatened termination.[14]

Maddox has never had a driving accident on the job including during his twenty year Naval career where he drove on the ice in Antarctica and drove all types of military vehicles including those carrying bombs. The district court credited the testimony of Plaintiffs' low vision expert witness, Dr. Paul Freeman, that the visual requirements of AD3-3 were not related to safe driving or lower accident rates and that Maddox's loss of visual acuity in his left eye did not pose a risk to the City or to himself. Dr. Freeman specifically testified that Maddox's visual acuity and peripheral vision are better than that necessary for safe driving.[15]

Shortly before trial AD3-3 was amended to provide possible waivers to the diabetes restriction. The waivers were to be determined by the City Safety Officer, who was not a physician. Chandler applied for and received such a waiver on January 26, 1990. No waiver is available for the vision restrictions of AD3-3. At the same time, the City reclassified the positions that Plaintiffs held, Electrical Repairer T-7 and Plant Mechanic T-7, so that

---

[14] Tr. 18, pp. 75-77.

[15] Tr. 22, pp. 17 and 22.

they were no longer "primary driving" positions. Because of such reclassification Maddox was permitted to start driving as a T-7 plant mechanic on March 9, 1990.[16]

3. *The Class*

Class members have been barred from four thousand (4,000) city jobs because of their impairments. They have also been disciplined and demoted because they do not meet the physical requirements of AD3-3. Class members Nathaniel Richardson and Homer Stephens testified and presented documentary evidence that the City demoted them after discovery that they were insulin dependent diabetics. These and all demotions are discipline according to the City.

REASONS FOR GRANTING THE WRIT

This case poses questions of extraordinary and timely importance to millions of Americans under federal legislation prohibiting discrimination against the disabled. The decision conflicts with this Court's holdings in *School Bd. of Nassau County v. Arline*, 480 U.S. 272 (1987), other court decisions, and federal regulations. Finally, the

---

[16] These changes do not moot the present controversy. If this Petition is not granted, the Plaintiffs will likely be demoted to the same positions that they held prior to suit. Chandler will actually be in a worse position as he was demoted shortly after filing suit and in retaliation for his claims according to the district court. The Plaintiffs will receive no district court awarded back pay and damages. The Plaintiffs and class members will not be allowed to apply for promotion to driving positions and may be disciplined, demoted and terminated on the basis of their handicaps according to the court of appeals' holding that their impairments disqualify them as a matter of law. In summary, Plaintiffs and class members will receive no relief and the City will be free to continue to discriminate against handicapped employees pursuant to AD3-3. And, of course, the City's violations of Plaintiffs' rights under the United States Constitution and the Texas Commission on Human Rights Act, as found by the district court, will continue.

court of appeals' violation of the clearly erroneous rule in disregarding and reversing the district court's careful and detailed findings calls for exercise of this Court's supervisory powers.

I. THE QUESTIONS PRESENTED ARE IMPORTANT.

The court of appeals has barred the protections of the Rehabilitation Act to millions of the Act's intended disabled beneficiaries.

The Rehabilitation Act was landmark legislation recognizing the millions of handicapped Americans [17] as denied employment largely because of perceptions, stereotypes, and prejudices, not individual ability.[18] In 1990 the Rehabilitation Act was practically extended to the private

---

[17] The number of disabled Americans was estimated by Congress while considering the Rehabilitation Act and its amendments to be anywhere from 22,000,000 to 50,000,000. S. Rep. No. 1297, 93rd Cong., 2nd Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400. The Americans with Disabilities Act states that 43,000,000 Americans are physically or mentally disabled. 42 U.S.C. § 12101(a)(1).

[18] In 1974 Congress observed:

> Individuals with handicaps are all too often excluded from school and educational programs, barred from employment or are underemployed because of archaic attitudes and laws . . . and are discriminated against by public laws which frequently exclude individuals with handicaps or fail to establish appropriate enforcement mechanisms.

S. Rep. No. 1297, *supra*. Similarly, Senator Hubert Humphrey observed in commenting about regulations promulgated to enforce the Rehabilitation Act that:

> Certain kinds of discrimination have become so ingrained in our society they almost *enjoy* respectability. The [HEW] regulations will mean making an extra effort to share—to share with handicapped Americans the opportunities for an education, transportation, housing, health care and jobs that other Americans take for granted.

123 Cong. Rec. 13,515 (May 4, 1977).

sector by the enactment of the Americans with Disabilities Act.[19]

The Rehabilitation Act seeks to remedy the discrimination that disabled individuals continually encounter by "empowering such individuals to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society through . . . the guarantee of equal opportunity." [20] The primary goal of the Rehabilitation Act is to increase the employment of the handicapped.[21] The purpose of the Rehabilitation Act is to substitute individual assessment of a disabled person's abilities for reliance on archaic attitudes and laws to determine whether a disabled person is qualified for employment.

The court of appeals has, in this case, narrowed the applicaton of the Rehabilitation Act in contradiction to

---

[19] Before and after the passage of the Americans with Disabilities Act Congress continually emphasized the close relationship between the Rehabilitation Act and the Americans with Disabilities Act. The Rehabilitation Act was amended in 1992 to "ensure that the precepts and values embedded in the Americans with Disabilities Act are reflected in the Rehabilitation Act of 1973." S. Rep. No. 357, 102nd Cong., 2nd Sess., *reprinted in* 1992 U.S.C.C.A.N. 3712, 3713. The Americans with Disabilities Act similarly explained that it borrowed much of its substantive framework from Section 504 of the Rehabilitation Act of 1973. H. Rep. No. 485 (III), 101st Cong., 2nd Sess., *reprinted in* 1990 U.S.C.C.A.N. 445, 455.

[20] 29 U.S.C. §§ 701(a)(5) and (b)(1)(F).

[21] Indeed, enhancing employment of the handicapped was so much the focus of the original legislation in 1973, that Congress found it necessary the next year to explain that the Act was also intended to prohibit discrimination against the handicapped in other areas. *School Bd. of Nassau County v. Arline*, 480 U.S. 273 n.3 (1987); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 n.13 (1984). *See also*, Anna Phipps Engh, Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 Wm. & Mary L.R. 149, 152-53 (1988).

these goals. It has misapplied two frequently litigated issues under the Act, the definition of handicap and the determination of whether the handicapped individual is "otherwise qualified," to find deserving impaired persons neither handicapped nor otherwise qualified and therefore unprotected by the Act. The result is contradictory. According to the Fifth Circuit admitted physical impairments such as insulin controlled diabetes and visual deficiencies are not so severe as to be handicaps, but the same physical impairments are, as a matter of law, so severe that persons with these impairments are not otherwise qualified. This interpretation makes the Act inapplicable to virtually any impaired person.

The court of appeals' decision directs that millions of persons with diabetes requiring insulin for control and visual deficiencies are, as a matter of law, not qualified to hold positions that involve any amount of driving.[22] It, in effect, discourages employers from following the requirements of the Rehabilitation Act and the Americans with Disabilities Act to determine if disabled persons are qualified for such positions. The decision counsels employers to do exactly that which the Rehabilitation Act sought to eradicate, rely on disability status, not individual abilities, in employment decisions.

The court of appeals' denial to millions of disabled Americans of the Rehabilitation Act's intended prohibition of discrimination in contradiction to the Act requires review.

---

[22] Diabetes alone affects an estimated 13,000,000 Americans. Dep't of Health and Human Serv., Diabetes in the United States: A Strategy for Prevention (1993) at 3. Over 300,000 Americans are insulin dependent. Ingrid Libman et al., *How Many People in the U.S. Have IDDM?*, 16 Diabetes 841 (1993). Many others also use insulin to control their diabetes. With the City of Dallas, the Fifth Circuit's ruling bars employees with insulin controlled diabetes from 4,000 positions in 138 different job categories.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH SUPREME COURT AND OTHER COURTS OF APPEALS' PRECEDENT.

A. Handicapped Status.

Primary elements of proof in a Section 504 Rehabilitation Act case are whether plaintiffs are handicapped as defined in the Act and whether they are "otherwise qualified" with or without reasonable accommodations.[23]

The Rehabilitation Act defines a handicapped individual as one who:

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;
>
> (ii) has a record of such impairment; or
>
> (iii) is regarded as having such an impairment.[24]

Contrary to this definition the Fifth Circuit held that diabetes requiring insulin for control and uncorrectable vision are not handicaps per se and that the City did not regard Maddox and the vision subclass as having an impairment that substantially limited any major life activity.

This holding conflicts with this Court's instructions in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987). Arline's tuberculosis was found to be a handicap because:

> This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of . . . impair-

---

[23] *E.g., School Bd. of Nassau County v. Arline*, 480 U.S. 273, (1987); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

[24] 29 U.S.C. § 706(8)(b).

> ment" within the meaning of 29 U.S.C. Section 706 (7)(b)(ii) and is therefore a handicapped individual.

This Court further explained, in *Arline*, that a plaintiff was handicapped even if the impairment did not, in fact, limit that person's functioning, but such impairment was perceived or treated as substantially debilitating. The Court cited Congress's expansion in 1974 of the definition of handicapped individual to include those persons with a record of or who are regarded as having an impairment but who may not be actually incapacitated.[25] Finally, the Court explained that the definition of handicap is broad under the Rehabilitation Act. *Arline* at 285.

The diabetes and visual problems of Plaintiffs and class members are serious. These impairments are permanent. Plaintiffs have had these conditions for decades. They have continually sought and received medical treatment and they have even been hospitalized for these conditions. According to *Arline*, their impairments are handicaps. The City, through AD3-3 has also defined plaintiffs as handicapped and barred them from thousands of primary driving positions thus treating them as if they were handicapped.

---

[25] Congress expanded the definition of handicapped to clarify that it intended to include those persons who are discriminated against on the basis of handicap whether or not they are in fact handicapped:

> This subsection includes within the protection of sections 503 and 504 those persons, who do not in fact have the condition they are perceived as having, as well as those persons whose mental or physical conditions do not substantially limit their life activities and who are not technically within [the first clause] in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

S. Rep. No. 1297, *supra*, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389-90.

The Fifth Circuit's holding that Plaintiff's impairments are not handicaps also conflicts with the findings in all other courts of appeals addressing the issue that insulin dependent diabetes is or has been agreed to be a handicap under the Rehabilitation Act.[26] Similarly, the courts have repeatedly found that visual impairments short of legal blindness (20/200 Snellen) are handicaps.[27]

The Fifth Circuit's opinion also admittedly conflicts with federal regulations applying statutes prohibiting employment discrimination against the disabled.[28] The Fifth Circuit specifically recognized that EEOC regulations provide that insulin dependent diabetes is a handicap, but failed to follow the cited regulation. *Chandler*, 2 F.3d at 1391.

---

[26] *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993); *Wood v. Omaha School District*, 985 F.2d 437 (8th Cir. 1993); *Serrapica v. City of New York*, 708 F. Supp. 64 (S.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2nd Cir. 1989); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989); *Bentivegna v. Department of Labor*, 694 F.2d 619 (9th Cir. 1982). See also, *Brown v. County of Genesee*, 37 F.E.P. 1595 (D.C. Mich. 1985); *Miller v. Sioux Gateway Fire Dep't*, 497 N.W.2d 838 (Iowa, 1993); *Commonwealth Dep't of Transp. v. Tinley*, 564 A.2d 286 (Pa. Commw. Ct. 1989), *All. den'd*, 575 A.2d 570 (Pa. 1990); *Jackson v. Maine*, 544 A.2d 291 (Me. 1988), *cert. den'd*, 491 U.S. 904 (1989).

[27] *Norris v. St. Joseph Hospital*, 1993 U.S. App. LEXIS 11991 (4th Cir. 1993) (glaucoma); *O.F.C.C.P. v. Norfolk & Western R.R. Co.*, Case No. 90-OFC-1 (June 26, 1991) (vision in one eye only); *Greenwood v. State Police Training Ctr.*, 606 A.2d 336 (N.J. 1992) (blurred vision); *Colorado Civil Rights Comm'n v. North Wash. Fire Prot. Div.*, 772 P.2d 70 (Colo. 1988) (*en banc*) (correctable vision); *Frito-Lay v. Wisconsin Labor & Ind. Rev. Comm'n*, 290 N.W.2d 551 (Wis. 1980), *aff'd*, 303 N.W.2d 668 (Wis. 1980); *Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights and Oppor.*, 405 A.2d 618 (Conn. 1978).

[28] According to this Court, and even the Fifth Circuit, regulations promulgated to accompany the Rehabilitation Act "accurately express Congressional intent." *Arline*, 480 U.S. at 279-80; *Chiari v. City of League City*, 920 F.2d 311 n.6 (5th Cir. 1991); *Prewitt v. United States Postal Service*, 622 F.2d 292, 308-9 (5th Cir. 1981).

The federal regulations repeatedly provide that the third part of the definition of handicapped or disabled, "is regarded as having such an impairment," means:

> (1) has a physical or mental impairment that does not substantially limit major life activities, but is treated by an employer as constituting such a limitation;
>
> (2) has a physical impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment;
>
> (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an impairment.[29]

Federal regulation defines working or employment as a major life activity:

> . . . for purposes of this part, a handicapped individual is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a handicap.[30]

Finally, regulations have directed that in order to determine if a physical impairment is a handicap it must be looked at without mitigating medicine or devices. The EEOC specifically explained that:

> A diabetic, who, without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.[31]

The City has treated and regarded its diabetic and visually impaired employees as handicapped by barring

---

[29] 45 C.F.R. § 84.3 (1992); 40 C.F.R. § 7.25 (1993); 29 C.F.R. § 32.3 (1993); 28 C.F.R. § 42.50(k) (1993). App. 100a-101a.

[30] 41 C.F.R. § 60-741.2 (1993). App. 101a-102a.

[31] 29 C.F.R. § 1630.2(j), App. 104a.

them from thousands of jobs because of their impairments under AD3-3. According to federal regulations these employees are handicapped.

The court of appeals has applied an unprecedentedly narrow view of the definition of handicap to exclude physically impaired persons from intended coverage under the Rehabilitation Act. Without reversal, Plaintiffs, class members, and millions of persons with insulin dependent diabetes and visual deficiencies under Fifth Circuit jurisdiction will not be allowed to proceed under the statutes against handicap discrimination regardless of their abilities because they do not meet the definition of "handicapped." The Fifth Circuit's holding also means that these persons will be denied opportunity to prove their individual capabilities for employment in Texas, Louisiana, and Mississippi while no such limitation would be applied to them anywhere else.

B. Otherwise Qualified.

The Fifth Circuit holding that as a matter of law Plaintiffs and all persons with insulin controlled diabetes and uncorrectable visual impairments as defined in Department of Transportation regulations for interstate drivers are not "otherwise qualified" because they present safety risks conflicts with Supreme Court and lower court precedent and the intent of the Rehabilitation Act.

In *School Bd. of Nassau County v. Arline*, 480 U.S. 273, the Court addressed the claim that the plaintiff was not otherwise qualified because of the alleged threat of her impairment, tuberculosis, to the safety of others. It provided that the trial courts must, in most cases, conduct an individualized inquiry including review of medical evidence in order for "Section 504 to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear." [32]

[32] The Court cited Congressional action to expand the definition of handicapped individual and Congressional concern to protect

The Court explained that although some persons with a particular impairment may pose a serious health threat to others, exclusion from coverage of all persons with actual or perceived handicaps is not justified. The Court continued that:

> Such exclusion would mean that those accused of being [safety risks] would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.[33]

Other courts have also required individualized inquiry of the issue of otherwise qualified. They have held that where a defense of safety risk is raised, the defendant must show reasonable probability of substantial harm based on review of the employee's work history, medical

---

"the handicapped against discrimination stemming not only from prejudice, but from archaic attitudes and laws, and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.' S. Rep. No. 1297, p. 50 (1974)." *Arline*, 480 U.S. 273 at 279.

The Court's concern that stereotypes and outmoded perceptions not be automatically accepted as bases for determinations that disabled Americans are not qualified by reason of their disabilities was echoed in subsequent legislative history concerning the Americans with Disabilities Act. H. Rep. No. 485(III), 101st Cong., 2nd Sess., *reprinted in* 1990 U.S.C.C.A.N. at 453 warns that "identified common barriers that frequently result in employers excluding disabled persons, . . . includ[ing] concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers" should be carefully scrutinized. Congress also stated its agreement with the required individual consideration provided by this Court in *Arline* in its explicit statement that it intended to codify the direct threat standard used in *Arline*. H. Rep. No. 485(III), *reprinted in* 1990 U.S.C.C.A.N. at 455.

[33] *Arline*, 480 U.S. 273 at 285.

history, and individual assessment of the probability and severity of potential injury. Where safety concerns have been raised the individualized inquiry requirement has been applied with regard to insulin dependent diabetes,[34] epilepsy,[35] hearing impairments,[36] chronic hepatitis,[37] AIDS,[38] back abnormalities,[39] Parkinson's disease,[40] and morbid obesity.[41]

Commentators have also explained that the allegation of risk to self or others cannot be accepted automatically:

> [T]o find that a handicapped person is not qualified based on fear of harm to others there must be a substantive record of evidence supporting the proposition that performance by the handicapped person would constitute a threat to the health or safety of others.[42]

The Fifth Circuit's determination that as a matter of law Plaintiffs and class members are not otherwise qualified because of diabetes and visual impairments is in conflict with the requirements of *Arline*, the above cited

---

[34] *Bentivegna v. Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982).

[35] *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985).

[36] *Strathie v. Dep't of Transp.*, 716 F.2d 227 (3rd Cir. 1983).

[37] *Lussier v. Dugger*, 904 F.2d 661 (11th Cir. 1990).

[38] *Chalk v. U.S. Dist. Court, Cent. Dist. of California*, 840 F.2d 701 (9th Cir. 1988).

[39] *E.E. Black Ltd. v. Marshall*, 497 F. Supp. 484 (D.C. Haw. 1980); *Dep't of Labor v. Texas Instruments*, 80 OFC-28, 47 F.E.P. 18 (June 7, 1988).

[40] *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991).

[41] *Cook v. Rhode Island*, 10 F.2d 17 (1st Cir. 1993).

[42] Bonnie P. Tucker, *Section 504 of the Rehabilitation Act after Ten Years of Enforcement: The Past and the Future*, 4 U. Ill. L. Rev. 845, 901-2 (1989). *See also*, Mark L. Bayler, *Dulling a Needle: Analyzing Federal Employment Restrictions on People with Insulin Dependent Diabetes*, 67 Ind. L.J. 1067, 1086-89 (1992).

cases, and legislative intent that each handicapped person's abilities, not his status, determine if he is employed and provided the benefits of such employment.

The Fifth Circuit's reliance on Department of Transportation (DOT) regulations for interstate truck drivers to support its wholesale exclusion of thousands of individuals from city positions is unsupported by the actual regulations and conflicts with Supreme Court precedent.

The DOT regulations have no application to city drivers or to vehicles weighing 10,000 pounds or less,[43] the type of driving performed and vehicles driven by Plaintiffs. Thus the DOT regulations were never applicable to the Plaintiffs. Moreover, the DOT regulations include waiver provisions for insulin dependent diabetes and visual deficiencies,[44] again making the Fifth Circuit's reliance on them to deny Plaintiffs, class members, and by extension all persons with insulin dependent diabetes and visual deficiencies in driving positions unfounded.

The Court in *Johnson v. Mayor of Baltimore,* 472 U.S. 353 (1985), directed that wholesale reliance on a federal statute to justify local government regulations and legitimate discrimination per the local regulations is improper. In *Johnson,* the Court reversed a Fourth Circuit holding that a federal statute generally requiring federal fire fighters to retire at age fifty-five established, as a matter of law, that age fifty-five is a bona fide occupational qualication (BFOQ) for non-federal fire fighters within the meaning of the Age Discrimination in Employment Act (ADEA). The Court held that non-federal employers should not be allowed to circumvent the individual fact finding requirements as to ability to perform the job by mere citation to an unrelated statutory provision. Similarly, in *Western Airlines, Inc. v. Criswell,* 472 U.S.

---

[43] 49 C.F.R. §§ 390.3 and 390.5, App. 105a.

[44] 58 Fed. Reg. 40690 (July 29, 1993); 57 Fed. Reg. 10295 (March 25, 1992).

400 (1985), the Court held that age sixty required retirement of air line pilots does not establish that age is also a BFOQ for any other position including flight engineer under the ADEA. The Court emphasized that the BFOQ provisions are to be narrowly applied and that any discriminatory provisions must be proven by the employer to be reasonably necessary for safety.

The Supreme Court has thus instructed that a non-federal employer such as the City of Dallas cannot circumvent the Rehabilitation Act requirement of individualized determination of ability to perform the job through reliance on a federal regulation. This is particularly so when the City has not even determined or claimed that its physical restrictions are BFOQs.[45]

C. Class Certification.

The court of appeal's reversal of the district court's class certification and class injunctive relief again conflicts with the requirements under the Rehabilitation Act and precedent that qualifications of disabled persons be determined on an individual basis, in most cases, not according to status.[46]

The district court held that the City, "the party opposing the class," had with respect to AD3-3 "acted or refused to act on grounds generally applicable" to the two subclasses, thereby making injunctive relief only appropriate to prevent the discriminatory application of AD3-3 under Rule 23(b)(2). The trial court required that the City stop discriminating against its employees on the basis of their handicaps without proof that each individual excluded from "primary driving" positions was a safety risk. The Fifth Circuit held that class certifi-

---

[45] Tr. 21, pp. 62-63; Findings and Conclusions, App. 31a.

[46] See I. and II.B., *supra*.

cation and injunctive relief were improper because the Rehabilitation Act required individual consideration.[47] The court of appeals' reversal is puzzling as individual consideration is exactly what the district court ordered the City to provide to persons it defined and treated as handicapped under AD3-3.

The court of appeals' reversal again affects millions of Americans. It effectively bars the use of class actions in handicapped cases, at least all cases where qualifications are at issue.

D. Due Process.

Plaintiff Chandler appealed his demotion. He was not allowed to present any evidence that his demotion was due to his claims of handicapped discrimination and filing of this lawsuit. The district court specifically held:

> The City violated Chandler's *due process* rights by denying him any opportunity to present evidence—during Chandler's appeal from the demotion—that he had been demoted because of his opposition to AD3-3's discrimination against handicapped employees. This denial of Chandler's due process rights was distinct from the City's actual discrimination against Chandler because of his handicap.[48]

Contrary to such holding, the Fifth Circuit summarily reversed holding that the hearing was constitutionally adequate.

The Fifth Circuit's reversal on this issue conflicts with the well established precedent that due process requires that Plaintiff Chandler, who, through his demotion, lost

---

[47] The Fifth Circuit's recognition that the Rehabilitation Act requires individual assessment on the issue of qualification is correct. It also reveals the court of appeals' error in its conflicting holding that persons with insulin controlled diabetes and visual deficiencies are not otherwise qualified as a matter of law.

[48] Findings and Conclusions, App. 66a.

a protected property interest, be allowed a meaningful opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985); *Thurston v. Dekle,* 531 F.2d 1264 (5th Cir. 1985).

III. IT IS NECESSARY THAT THIS COURT EXERCISE ITS SUPERVISORY POWERS.

The court of appeals violated the clearly erroneous rule by summarily reversing the district court's detailed findings of fact which the City did not question on appeal.

Federal Rule of Civil Procedure 52(a) provides:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness.

The clearly erroneous standard precludes a court of appeals from reversing a district court's decision if that court's account of the evidence is plausible in light of the record viewed in its entirety, even though the court of appeals is convinced that it would have weighed the evidence differently had it been sitting as the trier of fact. *E.g., Anderson v. City of Bessemer City,* 470 U.S. 564 (1985); *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). *See, Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 400 (1990).

The *Pullman Standard* case is remarkably similar to the present case. In *Pullman Standard,* as in this case, the Fifth Circuit reversed and rendered a district court decision in a discrimination case on its own findings regarding discrimination. This Court strictly instructed that findings of fact including the ultimate fact of intentional discrimination are governed by the clearly erroneous rule and that the Fifth Circuit could not reverse and render on its own determination of the facts.

Even the Fifth Circuit, in its first (1992) decision in this case, recognized that it was bound by the clearly erroneous standard in reviewing the district court's findings of fact. It held that the trial court had "heard all of the evidence, allowed the parties to present their cases in full, and sought to resolve the case in a responsible manner." *Chandler,* 958 F.2d at 90. But, the Fifth Circuit instructed that it needed detailed findings of fact:

> [T]he portion of the judgment rendering the City liable on the Plaintiffs' Rehabilitation Act claims alone required multiple findings of fact: whether the Plaintiffs were "handicapped" within the meaning of the Rehabilitation Act; whether the Plaintiffs were "otherwise qualified" for their jobs at DWU . . . . Without findings on these and other issues of fact, we cannot obtain a complete understanding of the issues on appeal and shoulder our responsibility to review for clear error.

Nevertheless, in direct conflict with the district court's subsequent unchallenged findings, the Fifth Circuit held in its second opinion that Plaintiffs were not handicapped and not otherwise qualified. The Fifth Circuit also summarily reversed the district court's finding regarding class certification, its findings of denial of freedom of speech, due process, and equal protection. Finally, the court of appeals reversed, without any explanation or reference, the district court's detailed findings that the City retaliated against Plaintiffs in violation of the Rehabilitation Act by threatening them with discharge and demoting Chandler.

The court of appeals' actions conflict with Rule 52(a), Supreme Court precedent, and even the law of this case. It was not within the province of the court of appeals to substitute its contrary findings of fact for those of the trial court. It was also improper for the court of appeals to reverse and render based on its own findings. Only through this Court's exercise of its supervisory powers can the court of appeals' violation of the clearly erroneous rule be corrected.

CONCLUSION

A writ of certiorari should be issued and the judgment and decision of the court of appeals should be reversed.

Respectfully submitted,

GENICE A.G. RABE
Counsel of Record
L.N.D. WELLS, JR.
Suite 1202
600 E. Las Colinas Boulevard
Irving, Texas 75039-5606
(214) 556-2999
Counsel for Petitioners

January 31, 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1849

LYLE S. CHANDLER and ADOLPHUS A. MADDOX,
on behalf of themselves and others similarly situated,
Plaintiffs-Appellees,

v.

THE CITY OF DALLAS, *et al.*,
Defendants,

THE CITY OF DALLAS,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Sept. 20, 1993

Frank J. Garza, Asst. City Atty., Sam A. Lindsay, City Atty., Dallas, TX, for defendant-appellant.

Genice A.G. Rabe, Irving, TX, for plaintiffs-appellees.

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

WIENER, Circuit Judge:

I

FACTS AND PROCEEDINGS

In 1978, the City of Dallas, Texas (Dallas or the City) adopted a Driver Safety Program (the Program) to reduce the risk of vehicular collisions. The Program established certain physical standards for city employees who

drive on public roads as an intrinsic part of their job duties. Employees of this type are referred to as Primary Drivers. The physical standards required by the Program were patterned on safety regulations promulgated by the United States Department of Transportation. If an employee did not meet these standards, he could not be certified as a primary driver and thus was ineligible for Primary Driver jobs.[1]

Two of the medical standards for Primary Drivers are of particular importance to the instant appeal. A Primary Driver: (1) cannot have an established medical history of diabetes mellitus severe enough to require insulin for control; and (2) must have 20/40 vision (corrected) and a field of vision of at least 70 degrees in the horizontal meridian in each eye. Plaintiff Lyle Chandler has diabetes mellitus that requires insulin for control. Plaintiff Adolphus Maddox has impaired vision in his left eye that cannot be corrected to meet minimum standards. Both of these plaintiffs held positions with the City that were classified as Primary Driver jobs.[2] Only 138 of the City's job classifications were considered Primary Driver jobs.

Chandler has required insulin for control of his diabetes since 1977 and has been an employee of Dallas since 1981. In 1985, the Chandler failed his initial driver's physical because of his diabetes. At that time he was employed as an Electrical Repairer T-9, a Primary Driver

---

[1] Apparently, no waiver initially was available for failure to meet a standard. Presently, all conditions are waivable except substandard vision, alcoholism, and drug abuse.

[2] The positions held by Chandler and Maddox were subsequently reclassified as non-primary driver jobs. The plaintiffs do not allege any impropriety in either the original classification or in the later reclassification. Neither do they contest the City's assertion that these positions were reclassified because the amount of driving associated with both positions had decreased. Additionally, Chandler has subsequently applied for and received a waiver allowing him to apply for primary driver positions.

position. Chandler was allowed to retain that position on the condition that he be driven by another co-worker when he had to go to another work site.

Chandler has had at least two major on-the-job hypoglycemic episodes that required emergency medical treatment. He also admits that he has had numerous other minor hypoglycemic incidents, during which he was confused. Chandler has also had a series of safety and misconduct incidents on the job. In 1986, he caused a serious electrical accident that resulted in injuries to himself and two co-workers. That same year, after a subsequent safety violation and violation of personnel rules, Chandler was demoted to Electrical Repairer T-7.

Maddox was hired by the City in 1982 and was promoted to Plant Mechanic T-7 in 1983. Maddox failed his initial driver's physical in 1985 because of poor vision in his left eye. Among other problems, his vision in his left eye cannot be corrected to better than 20/60 and his horizontal field of vision in that eye is less than 70 degrees. As with Chandler, Maddox was allowed to retain his then current position (which was also classified as a Primary Driver position) on the condition that a co-worker drive him when he needed to work at other facilities.

In December 1985, Chandler and Maddox filed suit against the City, alleging that the Program discriminated against them in violation of the Rehabilitation Act [3] (the Act), the Fourteenth Amendment, and 42 U.S.C. § 1983. They also sought to represent a class of persons adversely affected by the Program. The complaint was subsequently amended to include claims under the Revenue Sharing Act [4] and the Texas Commission on Human Rights Act.[5]

---

[3] 29 U.S.C. §§ 701-796.

[4] 31 U.S.C. § 6701 et seq.

[5] Tex.Rev.Civ.Stat.Ann. art. 5221k.

The district court certified two classes of plaintiffs (those with substandard vision and those with insulin dependent diabetes) for purposes of injunctive relief. After a bench trial, the court rendered judgment for the plaintiffs, but failed to make findings of fact and conclusions of law. The City appealed, and we vacated the judgment and remanded the case "for detailed findings of fact and concomitant conclusions of law."[6] On remand, the district court reinstated its judgment and made findings of fact and conclusions of law. The City has again timely appealed.

II

ANALYSIS

A. *The Rehabilitation Act*

The Act prohibits discrimination against otherwise qualified individuals with handicaps in programs that receive federal financial assistance.[7] The Act is intended to ensure that handicapped individuals receive the same treatment as those without handicaps.[8] To qualify for relief under this statute, a plaintiff must prove that (1) he was an "individual with handicaps"; (2) he was "otherwise qualified"; (3) he worked for a "program or activity" that received federal financial assistance; and (4) he was adversely treated solely because of his handicap.[9] The burden of proof for each of these elements lies with the plaintiff.[10]

---

[6] *Chandler v. City of Dallas*, 958 F.2d 85, 90-91 (5th Cir. 1992).

[7] The Act has been amended since the instant suit was filed. Among the changes to the Act was the substitution of the term "individual with a disability" for the original term "individual with handicaps." As we are required to apply the statute as it existed when this suit was filed (*See Chiari v. City of League City*, 920 F.2d 311, 315 (1991)), we will continue to use this now superseded terminology.

[8] *Chiari*, 920 F.2d at 315.

[9] *Id.*; *see* 29 U.S.C.S. § 794.

[10] *Chiari*, 920 F.2d at 315.

1. *Individual with Handicaps*

The relevant definition of the term "handicap" is critical to determining when a person can recover under the Act. For employment purposes, the Act defines an "individual with handicaps" as a person "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." [11] The plaintiffs argue both that they are handicapped under subsection (i) and that the City treated them as being handicapped under subsection (iii). Predictably, the City takes the opposite position on both of these claims.

Although the Act contains a definition of "handicap," it does not define the terms used in that definition. We are not without guidance, however, for the Supreme Court directs us to the Department of Health and Human Services (DHHS) regulations intended to implement the Act.[12] Those regulations define a physical impairment as

> any physiological disorder or condition, cosmetic disfiguration, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal, special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.[13]

"Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." [14]

---

[11] 29 U.S.C.S. § 706(8)(B) (1990).

[12] *School Board of Nassau Co. v. Arline*, 480 U.S. 273, 280, 107 S.Ct. 1123, 1127, 94 L.Ed.2d 307 (1987).

[13] 45 C.F.R. § 84.3(j)(2)(i) (1992).

[14] 45 C.F.R. § 84.3(j)(2)(ii) (1992).

According to these same regulations, a person is regarded as having an impairment that would constitute a handicap if he

> (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by [an employer] as constituting such a limitation;
>
> (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (C) has none of the [above described impairments] but is treated by [an employer] as having such an impairment.[15]

a. *Impaired Vision as a Handicap*

This court has previously held that a person is not handicapped if his vision can be corrected to 20/200.[16] Clearly, if vision that can be corrected only to 20/200 does not constitute a handicap, neither does vision that can be corrected to 20/60. Further, Maddox himself testified at length that his impaired vision did not substantially limit any of his major life activities. As Maddox failed to establish that his impaired vision substantially limits one or more of his major life activities, he is not handicapped under the first prong of the statutory definition of an individual with handicaps.[17]

b. *Insulin Dependent Diabetes as a Handicap*

The City contends that Chandler is not handicapped because he failed to establish that his insulin dependent diabetes substantially limits any of his major life activi-

---

[15] 45 C.F.R. § 84.3(j)(2)(iv) (1992).

[16] *Collier v. City of Dallas*, No. 86-1010 (5th Cir. August 19, 1986) (unpublished).

[17] *See* 29 U.S.C.S. § 706(8)(B)(i) (1990).

ties. Indeed Chandler himself testified that he did not consider his diabetes to be a substantial limitation on his major life activities. Given this testimony and the absence of any evidence to the contrary, we hold that Chandler failed to establish that he was handicapped by his insulin dependent diabetes.

Chandler advances an alternative argument that insulin dependent diabetes should be considered a handicap per se. Neither this nor any other circuit court has addressed whether insulin dependent diabetes constitutes a handicap per se. No explicit guidance is available from the Act itself or the DHHS regulations as neither expressly discusses diabetes. Chandler therefore bases his argument on language contained in the commentary to the Equal Employment Opportunity Commission (EEOC) regulations promulgated to implement the Americans with Disabilities Act (the ADA).

The ADA defines a disability in substantially the same terms as the Act defines an individual with handicaps (now an individual with a disability).[18] Stressing the similarities between the Act and the ADA, Chandler urges us to look to the ADA and the regulations promulgated under that act for additional guidance as to what constitutes a handicap under the Act.

The EEOC's implementing regulations for the ADA became effective on July 26, 1992.[19] In them, the EEOC

---

[18] *Compare* Rehabilitation Act, 29 U.S.C. § 706(8)(B) (defining an "individual with handicaps" (now an "individual with a disability") as a person "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment") *with* Americans with Disabilities Act, 42 U.S.C. § 12102 (defining the term disability, with respect to an individual, as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment").

[19] *See* 29 C.F.R. part 1630, § 1630.1 (1992).

uses the same definitions for key terms as does the DHHS in its regulations implementing the Act.[20]

The EEOC also included an appendix to 29 C.F.R. part 1630 entitled "Interpretive Guidance on Title I of the Americans with Disabilities Act." In the Interpretive Guidance, the EEOC notes that the ADA term "disabilities" is substantively equivalent to the term "handicaps" in the Act.[21] Of particular significance to the instant case is another statement in this appendix. In its discussion of the term "substantially limits," the EEOC states that "a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication." [22]

Thus, the EEOC apparently considers that any insulin dependent diabetic has a disability per se under the ADA. The issue remains whether this statement mandates that such a person also has a handicap per se under the Act. Nonetheless, we need not decide that issue today because even if we assume arguendo that Chandler is "handicapped" for purposes of the Act, he has failed to establish that he was "otherwise qualified" for Primary Driver jobs.[23]

c. *Regarded as Handicapped*

Maddox and Chandler in the alternative argue that they are handicapped under the third prong of the statutory definition because the City regards them as having such impairments.[24] They insist that the City regarded

---

[20] *See* 29 C.F.R. § 1630.2 (1992).

[21] 29 C.F.R. Part 1630, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, § 1630.1(a).

[22] *Id.* at § 1630.2(j).

[23] *See infra* Part II(A)(2).

[24] *See* 29 U.S.C.S. § 706(8)(B)(iii) (1990).

them as handicapped because it excluded them from Primary Driver jobs based on their impairments. According to the plaintiffs, this exclusion, by itself, constitutes a substantial limitation on one of their major life activities, i.e., working.

The issue of how limiting an employer must consider an employee's impairment to be before the employer is held to regard the employee as handicapped has been addresed by several courts. In *Forrisi v. Bowen*,[25] the Fourth Circuit considered the case of an employee with acrophobia (a fear of heights) who was discharged from his job because he could not climb ladders or stairs to certain heights, an integral part of his job. The employee subsequently sued under the Act, claiming that he was handicapped solely because the employer perceived him as being handicapped. The Fourth Circuit held that the employer did not regard the employee as handicapped simply because it found that he could not meet the demands of this particular job. "The statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." [26]

The Sixth Circuit held in *Jasany v. United States Postal Service* that, as a matter of law, an employee with strabismus (commonly known as "crossed eyes") was not regarded as handicapped when he was fired from a position which his strabismus prevented him from properly performing.[27] The Court suggested that a number of factors should be considered in determining whether a given impairment substantially limits an individual's employment potential. These factors included the number and type of jobs from which the individual was disqualified, the geo-

---

[25] 794 F.2d 931 (4th Cir. 1986).

[26] *Id.* at 935.

[27] 755 F.2d 1244, 1249-50 (6th Cir. 1985).

graphic area to which he has reasonable access, and the individual's employment qualifications.[28] The court concluded, "An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one."[29]

This court also has previously addressed this subject, albeit in abbreviated form. In an unpublished opinion, we affirmed the district court's determination in *Elstner v. Southwestern Bell Telephone Co.*[30] that Southwestern Bell did not regard Elstner as handicapped. Elstner was employed by Southwestern Bell as a service technician, a job in which he was required to climb telephone poles as an integral part of his job. After Elstner injured his knee, he could no longer climb poles. As a result, he was demoted to a lower paying job that did not require him to climb poles. Elstner filed suit against Southwestern Bell alleging, inter alia, violation of the Act. The district court found that Elstner failed to establish that he was handicapped; that his impairment did not substantially limit a major life activity, and he was not regarded as handicapped by Southwestern Bell on account of his impairment.[31] The district court found that even though Elstner had an impairment, it did not substan-

---

[28] *Id.* at 1249; *see also Welch v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (applying these factors in affirming summary judgment against plaintiff on grounds that he failed to establish that he was regarded as handicapped).

[29] 755 F.2d at 1249 n. 3. Such a "narrow range of jobs" need not be numerically insignificant. *See, Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) (holding that a perceived impairment that prevented the plaintiff from successfully applying for a position as a police officer for the City of New York did not constitute a substantial limitation of a major life activity). This court takes judicial notice that New York City employs over 27,000 police officers, considerably more positions than are at issue in the instant suit.

[30] 863 F.2d 881 (5th Cir. 1988) (unpublished opinion), *aff'd* 659 F.Supp. 1328 (S.D.Tex. 1987).

[31] 659 F.Supp. at 1343.

tially limit his ability to work or Southwestern Bell's perception of his ability to work. Instead, Elstner's injured knee disqualified him only from those positions that required climbing.[32] Southwestern Bell's perception that he was able to work in other positions was evidenced by its retention of Elstner in a position that did not require climbing.[33] We subsequently affirmed the district court's conclusion that Elstner was not handicapped: "Because the plaintiff presented no evidence that he was substantially limited in [a] major life activity or in performing work-related functions in general, he was not a handicapped person under either federal or state law." [34]

In the instant case, both Chandler and Maddox appear to have been capable of safely performing all duties of their respective positions except driving. Significantly, the City recognized their ability to perform most of the duties associated with their respective positions. The City was aware of both subjects' impairments when it hired them, but it hired them nonetheless. When their jobs were classified as Primary Driver jobs, the City did not fire or demote them to non-Primary Driver positions.[35] Instead, it retained them in those positions and ensured that another employee would be available to drive for them. Neither did the City bar them from promotional opportunities; they were only disqualified from applying for Primary Driver positions. And, promotional

---

[32] *Id.*

[33] *Id.*

[34] 363 F.2d 881, slip op. at 2; *see also de la Torres v. Bolger*, 610 F.Supp. 593, 596-97 (N.D.Tex. 1985), *aff'd.* 781 F.2d 1134 (5th Cir. 1986) ("An impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment otherwise is not 'substantially limiting' for purposes of the Rehabilitation Act.").

[35] *Cf. Forrisi v. Bowen*, 794 F.2d 931 (employee terminated); *Jasany*, 755 F.2d 1244 (employee demoted).

pathways that did not involve such positions remained available to both Chandler and Maddox.

An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general. The only relevant limitation perceived by the City regarding the plaintiffs' ability to work concerned their abilities ot drive City vehicles on the job without risk to themselves or others. Chandler and Maddox failed to adduce sufficient evidence to support a finding that the City regarded them as handicapped.

2. *"Otherwise Qualified"*

Taken literally, "otherwise qualified" could be defined to include those persons who would be able to meet the particular requirements of a particular program "but for" the limitations imposed by their handicaps. The Supreme Court, however, expressly disapproved of such an interpretation because of the absurd results that would be produced.[36] "Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress."[37] The Supreme Court instead defined an otherwise qualified person as "one who is able to meet all of a program's requirements *in spite of* his handicap."[38]

The definition of a qualified handicapped individual also includes a personal safety requirement—an otherwise qualified handicapped individual is defined as one who "can perform the essential functions of the position in

---

[36] *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979).

[37] *Id.* at 407 n. 7, 99 S.Ct. at 2367 n. 7.

[38] *Id.* at 406, 99 S.Ct. at 2367 (emphasis added).

question without endangering the health and safety of the individual or others." [39] "[U]nder section 504, an individual is not qualified for a job if there is a genuine substantial risk that he or she would be injured or could injure others, and the employer cannot modify the job to eliminate that risk." [40]

Therefore, to determine whether an individual is otherwise qualified for a given job, we must conduct a two part inquiry. First, we must determine whether the individual could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue.[41] Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.[42] As with establishing the existence of a handicap, the burden lies with the plaintiff to show that he is otherwise qualified.[43]

Under the Program, the City established three distinct categories of drivers. Primary Drivers are those City employees who are certified to operate a motor vehicle on public thoroughfares for the City as an *intrinsic* part of their job duties. Secondary Drivers are those City employees who are certified to operate a motor vehicle on public thoroughfares for the City as an *adjunct* duty to their job. Tertiary Drivers are those City drivers who operate motor vehicles and automotive equipment on City property where public access is limited. Only Primary Drivers are subject to the strict physical standards of the Program.

---

[39] *Chiari*, 920 F.2d at 317 (internal quotation, emphasis, and footnote omitted).

[40] *Id.*

[41] *Id.* at 315.

[42] *Id.*

[43] *Id.*

The plaintiffs do not seriously contest the City's assertion that driving is an essential function of every Primary Driver positions. Instead, they argue that they can safely perform all of the functions of their respective jobs, including driving, without accommodation. In taking that approach, the plaintiffs failed to adduce sufficient evidence that would support a finding that they were otherwise qualified for Primary Driver positions.

The Program is based on regulations promulgated by the Federal Highway Administration, Department of Transportation, to promote, *inter alia*, safe operation of motor vehicles.[44] These regulations provide in pertinent part that:

> A person is physically qualified to drive a motor vehicle if that person—
>
> . . . .
>
> (3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control; [and]
>
> . . . .
>
> (10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green and amber;
>
> . . . .[45]

These regulations, including the provisions relating to insulin dependent diabetes and impaired vision, have been

---

[44] *See* 53 Fed.Reg. 18042 (1988); 35 Fed.Reg. 6458 (1970); 34 Fed.Reg. 9080, 9081 (1969).

[45] 49 C.F.R. § 391.41(b) (1992).

in effect since 1970.[46] Since that time, the Federal Highway Administration has had numerous opportunities to revisit these regulations, and to update and amend them if need be.[47] Yet, the physical requirements regarding insulin dependent diabetes and impaired vision have remained unchanged. The statement of the Administrator of the Federal Highway Administration in the preamble to the proposed regulations remains valid to this day: "Accident experience in recent years has demonstrated that reduction of the effects of organic and physical disorders, emotional impairments, and other limitations of the good health of drivers are increasingly important factors in accident prevention." [48]

After implementing these regulations, the Federal Highway Administration received several petitions for reconsideration. The Director of the Bureau of Motor Carrier Safety (acting under authority delegated to him by the Administrator) responded to objections that the medical qualifications of § 391.41 were unduly stringent by stating: "In this area, however, the Director believes that the risks are so well known and so serious as to dictate the utmost caution. Hence, except as noted below, the physical qualifications are unchanged." [49] The standards for diabetes and vision are not among those that were altered in response to these petitions for reconsideration.

The issue whether an insulin dependent diabetic is otherwise qualified for positions involving driving or

---

[46] *See* 34 Fed.Reg. 9080 (1969) (notice of proposed rule making); 35 Fed.Reg. 6458 (1970) (notice of final rule).

[47] *See* 55 Fed.Reg. 3546 (1990); 53 Fed.Reg. 47134 (1988); 53 Fed.Reg. 18042 (1988); 51 Fed.Reg. 17568 (1986); 43 Fed.Reg. 56900 (1978); 36 Fed.Reg. 12857 (1971); 36 Fed.Reg. 222 (1971); 35 Fed.Reg. 17419 (1970).

[48] 34 Fed.Reg. at 9081; *see also* 35 Fed.Reg. at 6458 (stating that the Administrator remains convinced that this statement "still holds true.").

[49] 35 Fed.Reg. at 1749.

other high risk activities has been addressed by several federal courts. Those courts have uniformly held that insulin dependent diabetes present an unacceptable risk, and are thus not otherwise qualified, to be employed as, inter alia, sanitation truck drivers [50] or special agents with the Federal Bureau of Investigation.[51] We are aware of no cases holding that insulin dependent diabetes does not present a significant risk in connection with the operation of motor vehicles on public highways.

We hold that, as a matter of law, a driver with insulin dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. § 391.41 presents a genuine substantial risk that he could injure himself or others.[52] We echo the sentiment expresed by this court in *Collier:* "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident." [53]

As neither Chandler nor Maddox was otherwise qualified for Primary Driver positions in the absence of any employer accommodation, we must answer the second question of the analysis—whether any reasonable accommodation by the City would have enabled them to perform the essential functions of those positions.[54] For if

---

[50] *Serrapica v. City of New York*, 708 F.Supp. 64, 73 (S.D.N.Y. 1989).

[51] *Davis v. Meese*, 692 F.Supp. 505, 521 (E.D.Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

[52] We nonetheless share the hope of the court in *Davis* that medical science will soon progress to the point that "exclusions on a case by case basis will be the only permissible procedure; or, hopefully, methods of control may become so exact that insulin-dependent diabetics will present no risk of ever having a severe hypoglycemic episode." 692 F.Supp. at 520. But, as Chandler's two severe hypoglycemic reactions while employed by the City amply demonstrate, it has not yet reached that point.

[53] *Collier v. City of Dallas*, No. 86-1010, slip op. at 3 (5th Cir. August 19, 1986) (unpublished).

[54] *Chiari*, 920 F.2d at 315.

reasonable accommodation will not eliminate a significant safety risk, a handicapped person is not otherwise qualified.[55]

The record is conspicuously devoid of any evidence from Chandler or Maddox that reasonable accommodation was possible, much less that it would eliminate any safety risk inherent in their driving.[56] This evidentiary void is fatal to Plaintiffs' claims, given their burden of establishing that reasonable accommodation is possible so that they would be otherwise qualified for their respective positions if they were so accommodated.[57] As we find that neither plaintiff was otherwise qualified, in the absence of accommodation, because they posed a substantial risk of injury, the absence of evidence that reasonable accommodation could be made precludes the possibility that either plaintiff was "otherwise qualified." Therefore, the trial court clearly erred in holding that the plaintiffs were otherwise qualified for Primary Driving positions.

It follows that, as neither Chandler nor Maddox adduced sufficient evidence to support findings that they were both handicapped and otherwise qualified, their claims under the Act necessarily fail. We therefore need not address the remaining elements of their claims under the Act, i.e., whether they worked for a program or activity that received federal financial assistance and whether they were adversely treated solely because of any handicap.

---

[55] *Arline*, 480 U.S. at 287 n. 16, 107 S.Ct. at 1131 n. 16.

[56] *Cf. Wood v. Omaha School Dist.*, 985 F.2d 437, 438-39 (8th Cir. 1993) (holding that Type II (*non*-insulin dependent) diabetic plaintiffs raised a genuine issue of material fact by presenting evidence regarding how they could readily monitor their blood sugar levels and maintain them at proper levels during work so as to reduce or eliminate the risk of a hypoglycemic reaction while driving).

[57] *Chiari*, 920 F.2d at 315; *Wood v. Omaha School Dist.*, 985 F.2d 437, 439 (8th Cir. 1993).

B. *Class Certification*

The City argues that the district court improperly certified the two subclasses of plaintiffs because the determinations of whether an individual is handicapped or "otherwise qualified" are necessarily individualized inquiries. We agree.

"The question of whether an impairment constitutes a substantial limitation to a major life activity is best suited to a case-by-case determination." [58]

> To answer this question [of whether a person is otherwise qualified] in most cases, the District Court will need to make an individualized inquiry and made appropriate findings of fact. Such an inquiry *is essential* if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudices, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.[59]

As the facts of the instant case amply demonstrate, the effect of a given type of impairment, both on major life activities in general and on a person's ability to perform specific tasks, can vary widely from individual to individual. One person with impaired vision may simply need to wear glasses, while another may need a guide dog. The prospect of continuing medical advances in the treatment of diabetes (at an inherently unpredictable rate), further supports the need for individualized inquiries in this area. We conclude that class certification and class relief are inappropriate in the instant case.

---

[58] *Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328, 1342 (S.D.Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988) (internal quotation omitted); *see also Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986) ("The inquiry is, of necessity, an individualized one—whether the particular impairment constitutes for the particular personal significant barrier to employment.").

[59] *Arline*, 480 U.S. at 287, 107 S.Ct. at 1130 (emphasis added).

C. *Constitutional Rights*

The district court awarded the plaintiffs equitable relief and compensatory damages under 42 U.S.C. § 1983 for violations of their Constitutional rights. The plaintiffs argue that their First Amendment rights were violated by the City's taking retaliatory action against them for opposing the application of the Program. They also argue that they were denied equal protection and due process because the City did not have a rational basis for discriminating against them and because Chandler was not given adequate opportunity to be heard in relation to his demotion.

The City responds by insisting that the plaintiffs' failure properly to plead a First Amendment cause of action precluded the district court from rendering judgment for them on such a cause of action. Rule 8 of the Federal Rules of Civil Procedure does require "a short and plain statement of the claim showing that the pleader is entitled to relief." [60] Although the plaintiffs failed to comply with this rule, their First Amendment claim was included in the Joint Pre-Trial Order. Once entered, the pre-trial order generally controls the scope and course of the trial.[61] Further, the City has failed to demonstrate any prejudice resulting from the failure of the plaintiffs properly to amend their pleadings. Nonetheless, assuming without so deciding that the plaintiffs were not precluded from bringing this claim, they failed to adduce sufficient evidence to support a judgment in their favor. Even if we make the additional assumption that the plaintiffs engaged in protected speech (a proposition on which we have serious doubts), they failed to establish any causal nexus between such speech and any injury they may have incurred.

The plaintiffs' equal protection and due process claims are equally meritless. As discussed at length above, and contrary to the district court's conclusion, the City did

---

[60] Fed.R.Civ.P. 8(a)(2).

[61] *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982).

have a rational basis for adopting and maintaining the Program and its classifiaction of the plaintiffs. And, even though the City apparently did not afford Chandler all the latitude he desired at the administrative hearing concerning his demotion, the hearing it did provide was constitutionally adequate.[62]

As the plaintiffs have failed to establish any actionable violation of their constitutional rights, they are not entitle to relief under 42 U.S.C. § 1983.

D. *Texas Commission on Human Rights*

The Texas Supreme Court has adopted a very restrictive definition of "handicap" for purposes of the Texas Commission on Human Rights Act.[63] In *Chevron Corp. v. Redmon*,[64] that court expressly rejected the definition of an "individual with handicaps" from the federal Rehabilitation Act.[65] The court instead defined handicap as a disability "which is generally perceived as severely limiting in performing work-related functions in general."[66] Further, "a person may not sue [under art. 5221k] if his handicap impairs his ability to do *that* particular job."[67] The court also decided, *as a matter of law*, that vision which could not be corrected to 20/60 or better did not constitute "those severe impairments which article 5221k was intended to protect."[68] The failure of the plaintiffs' claims under the Rehabilitation Act clearly precludes them from recovering under the stricter Texas statute.

---

[62] *See Davis v. Scherer*, 468 U.S. 183, 192 & n. 10, 104 S.Ct. 3012, 3018 & n. 10, 82 L.Ed.2d 139 (1984); *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).

[63] Tex.Rev.Civ.Stat.Ann. art. 5221k.

[64] 745 S.W.2d 314 (Tex. 1987).

[65] *Id.* at 318.

[66] *Id.*

[67] *Id.*

[68] *Id.*

III

CONCLUSION

The plaintiffs failed to establish that they were both handicapped and otherwise qualified, either with or without reasonable accommodation by the City, for Primary Driver positions. Consequently, their claims under the Rehabilitation Act must fail. Further, class certification and relief are inappropriate in the instant case, given the strong preference for individualized determinations under the Act. As the plaintiffs' claims fail to meet the standards of the Act, so to do they fail to meet the more stringent standards of the Texas Commission on Human Rights Act. Finally, the plaintiffs failed to establish any Constitutional violations that would permit recovery under 42 U.S.C. § 1988.

For the foregoing reasons, we REVERSE the decision of the district court and RENDER judgment for the City of Dallas on all counts and in all respects.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:85-CV-2580-R

LYLE S. CHANDLER and, ADOLPHUS A. MADDOX,
on behalf of themselves and others similarly situated,
Plaintiffs

v.

CITY OF DALLAS, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Sep. 10, 1992]

This class action involves the "driver safety program" of the City of Dallas [1]—and its impact upon (i) employees who are *insulin-controlled diabetics* (including plaintiff/class representative Lyle S. Chandler, *whose diabetes mellitus has been well-controlled with insulin since its inception in 1977*), and upon (ii) employees who do not meet certain *vision standards* (including plaintiff/class representative Adolphus A. Maddox, *who since childhood has had better than 20/20 vision using both eyes, but less than 20/40 acuity in his permanently damages left eye*).

In February 1978, the City instituted a drive safety program through Administrative Directive 3-3 (*"AD 3-3"*).

---

[1] *See*—with my sincere apologies to the parties, to their attorneys, and to the Fifth Circuit panel (Goldberg, Duhé, and Barksdale)—*Chandler v. City of Dallas*, 958 F.2d 85 (5th Cir. April 9, 1992).

In January 1985, after Lyle S. Chandler (*"Chandler"*) had safely driven as a City electrician for over three years, he was no longer permitted to drive—and was blocked from future promotions—because Chandler's diabetic condition made him ineligible to drive under AD 3-3. In April 1985, after Maddox had safely driven as a City mechanic for over two years, he was no longer permitted to drive—and was blocked from future promotions—because the visual acuity in Maddox's left eye made him ineligible to drive under AD 3-3.

In December 1985, Chandler and Maddox filed this suit, alleging that AD 3-3 discriminated against them and other handicapped employees of the City. Some four years later (October 1989 and January 1990), the City made revisions to the AD 3-3 driver safety program.[2] Then, in January 1990, *Chandler was permitted to start driving again for the City as an electrician, even though he was still an insulin-controlled diabetic*—and in March 1990, *Maddox was permitted to start driving again for the City as a mechanic, even though his left eye was still permanently damaged.*

On October 10, 1990, after a five-day non-jury trial, this Court verbally announced *certain* findings of fact and conclusions of law.[3] Specifically, this Court held that the City's actions toward Chandler, Maddox and other class members violated the Rehabilitation Act of 1973, the Texas Commission on Human Rights Act, the First and Fourteenth Amendments (as to Chandler and Maddox only), and 42 U.S.C. § 1983.

These are the *complete,* albeit belated findings of fact and conclusion of law required by Fed.R.Civ.P. 52(a) and

---

[2] These revisions were made after this case had been certified as a class action (March 1989), and just before a trial scheduled for February 1990 (which was later postponed to August 1990).

[3] As explained below, this Court—*by mistake*—failed to complete the oral announcement of the findings of fact and conclusions of law.

by *Chandler v. City of Dallas*, 958 F.2d 85 (5th Cir. 1992).

I. *Findings of Fact*

A. *Background & Procedural History*

1. *The 1978 driver safety program* basically disqualified City employees who had certain health conditions from working in a "primary driving position"—i.e., any job that involved driving "as an *intrinsic* part of their job duties." The two disqualifying health conditions involved in this case are:

(i) *diabetes mellitus*—"currently requiring insulin for control"; and

(2) *poor eyesight*—"distant visual acuity uncorrectably worse than 20/40 Snellen in each eye or worse than 20/40 Snellen in both eyes, a field of vision of less than 70 degrees in the horizontal meridian in each eye, or the inability to recognize the colors of standard traffic signals." [4]

2. *Lyle S. Chandler* was hired by the City in 1981 as a T-9 Electrical Repairer in the Water Department—some four years after Chandler had been diagnosed as having diabetes mellitus severe enough to require insulin for control. In May 1984, the City reclassified the T-9 electrician job as a "primary driving position" under AD 3-3. Then, in January 1985, Chandler—*who had driven for over three years for the City*—was told that he was no longer qualified to drive for the City because of his insulin-controlled diabetic condition.[5]

3. *Adolphus Maddox* was hired by the City in 1982, and in 1983 he began work as a T-7 Plant Mechanic in the Water Department. Maddox has visual acuity worse

---

[4] Pl. Exh. 3; *Chandler*, 958 F.2d at 86-87.

[5] Chandler continued as a T-9 electrician, with other employees driving him to the different locations required by his job duties.

than 20/40 in his left eye, but had 20/10 vision using both eyes. In May 1984, the City reclassified the T-7 mechanics job as a "primary driving position" under AD 3-3. Then, in April 1985, Maddox—*who had driven for over two years for the City*—was told that he was no longer qualified to drive for the City because of his damaged left eye.[6]

4. *This lawsuit* was filed on December 20, 1985 by Chandler and Maddox, on behalf of themselves and all others adversely affected by the AD 3-3 driver safety program. The plaintiffs alleged violations of both federal[7] and state[8] laws prohibiting discrimination against handicapped employees because, under AD 3-3, employees with diabetes requiring insulin for control and employees with visual deficiencies were barred from jobs designated as "primary driving positions." Chandler and Maddox also alleged that the City had retaliated against them because of their opposition to the handicap discrimination of the AD 3-3 driver safety program.

5. *Pretrial motions* were filed by both sides. The City's motion to dismiss and its alternative motion for summary judgment were denied, except with respect to claims barred by the applicable statute of limitations.[9] Following an evidentiary hearing, the plaintiffs' class certification motion was granted *for purposes of injunctive relief* as to these two subclasses of City employees who had failed physicals under the driver safety program:

---

[6] Maddox continued as a T-7 mechanic, with other employees driving him to different job locations.

[7] The Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796 (1986); the Revenue Sharing Act of 1982, 31 U.S.C. §§ 6701-24 (1982 & Supp. 1986); 42 U.S.C. § 1983.

[8] The Texas Commission on Human Rights Act, Tex.Rev.Civ. Stat. Ann. art. 5221k (Vernon Supp. 1992).

[9] This limitations ruling barred all claims which occurred prior to December 20, 1983, two years before this suit was filed.

"All City of Dallas employees as of April 26, 1989, and all City of Dallas employees hired after April 26, 1989, who have failed or fail the driver's safety physical given pursuant to administrative directive 3-3 after December 19, 1983, because they:

(a) have an established medical, clinical history or medical diagnosis of diabetes mellitus, requiring insulin for control ("*diabetes standard subclass*"); or

(b) lack visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green and amber ("*vision standards subclass*").

6. *Before trial,* the City made two revisions to the AD 3-3 plan: (i) beginning in October 1989, employees with insulin-controlled diabetes were permitted to apply for waivers to allow them to hold "primary driving positions," and (ii) in January 1990, T-7 and T-9 jobs in the Water Department were reclassified so they were no longer "primary driving positions." On January 26, 1990, Chandler was granted a waiver and was again allowed to drive as an T-9 electrician for the City; on March 9, 1990, Maddox was again permitted to start driving as a T-7 mechanic since his job was no longer a "primary driving position." [10]

[10] Of course, these changes in AD 3-3 did not moot the present controversy. Both Chandler and Maddox have claims for lost promotions and other damages sustained during the periods they were disqualified from driving under AD 3-3. In addition, both the two individual plaintiffs and the class have claims for injunctive relief

7. *Trial* was held August 6-10, 1990. Only partial findings of fact and conclusions of law were announced on August 10, 1990, after the trial ended. Specifically, after closing arguments, this Court held:

> (i) that AD 3-3 discriminated against Chandler, Maddox and the two subclasses because of their disabilities;
>
> (ii) that the City had retaliated against both Chandler and Maddox because of their opposition to the discrimination of AD 3-3;
>
> (iii) that both Chandler and Maddox were entitled to be promoted to positions they were denied because of AD 3-3; [11] and
>
> (iv) that Chandler, Maddox and the two subclasses were entitled to injunctive relief.

However, the Court also advised the parties that additional time was needed for the preparation of *complete* findings and conclusions (which were to be stated orally in open court).[12]

8. *This Court,* unfortunately, was prevented from working on this case for the next several months.[13] Then,

---

to prevent the City from administering the AD 3-3 safety program so that it discriminates against handicapped employees in the "diabetes standard" and "vision standard" subclasses.

[11] Specifically, the evidence established that *but for AD 3-3* (i) *Chandler* would have been promoted to the T-10 electrical supervisor's job in January 1985 and to the T-13 water maintenance supervisor's position in May 1989, and would not have been demoted to the T-7 level in March 1986; and (ii) *Maddox* would have been promoted to the T-9 mechanics job in May 1985.

[12] The court reporter did not transcribe these *partial* findings and conclusions. Apparently, she did prepare a transcript for the attorneys (see *Chandler*, 958 F.2d 88 at fn.3), but this Court did not receive a copy until *August 20, 1992*.

[13] This was both because of illness and because of the time consumed by other litigation involving the City. See, e.g., *Williams v. City of Dallas*, 734 F.Supp. 1317 (N.D.Tex. 1990).

in April 1991, this Court erroneously concluded that oral findings and conclusions had been completed on August 10, 1990—and entered an order stating that these August 1990 verbal findings and conclusions "adequately state the factual and legal basics for this Court's decision."

9. *Final Judgment* was entered on April 29, 1991, awarding *Chandler* $79,220.91 in back pay and $100,000.00 for past and future pain and suffering and harm to his reputation, and awarding *Maddox* $27,741.96 in back pay and $25,000.00 for past and future pain and suffering and harm to his reputation. In addition:

> The court awarded the class injunctive relief requiring the City to: 1) retroactively certify all class members as primary drivers unless their medical conditions actually interfered with their driving abilities; and, 2) abstain from discriminating against any class member unless the City showed that the employee's medical condition interfered with the employee's ability to drive safely. The Plaintiffs were awarded reasonable attorney's fees and costs of litigation.[14]

Without addressing the merits of the City's appeal, the Fifth Circuit—of course—remanded "for detailed findings of fact and concomitant conclusions of law consistent with [its] opinion." *Chandler,* 958 F.2d at 90-91.

B. Credibility Findings

10. In judging the credibility of the witnesses, this Court—*with the use of its contemporaneous trial notes*—has considered all of the circumstances surrounding the testimony of each witness, including the person's memory, demeanor, manner of testifying, and interest in the outcome of the case; whether the answers were evasive or inconsistent; and whether the testimony was supported, or contradicted, by other credible evidence. Based upon these factors, this Court:

---

[14] *Chandler*, 958 F.2d at 87.

(i) credits the testimony of the two plaintiffs and class representatives, Lyle Chandler and Adolphus Maddox, because their testimony was clear, consistent, honest and believable; [15]

(ii) credits the testimony of the plaintiffs' expert witnesses (Dr. Philip Raskin, Dr. Alvin Smith, Dr. Paul Freeman, and Dr. Stephen Aranoff), but *completely* discounts the testimony of the City's expert (Dr. James Sheedy) because it was inconsistent and unbelievable;

(iii) discredits *completely* the testimony of three City witnesses—Charles Stringer, Joe Royal and Tony Hankins—because of their obvious bias against the plaintiffs and because their testimony was evasive, inconsistent, self-serving and untrue; [16] and

(iv) credits the testimony of other witnesses only to the extent that their testimony is consistent with these Findings of Fact.

C. Administrative Directive 3-3

11. The City's driver safety program was instituted by AD 3-3 ("Driver Safety Program") in 1978. Under AD 3-3, City employees who operate motor vehicles on public streets *"as an intrinsic part of their job duties"* had to be certified as "primary drivers" in order to drive City vehicles.

12. Since its inception, AD 3-3 has been amended numerous times.[17] Under the January 1986 revision of

---

[15] There were a few *minor* inconsistencies in Maddox's testimony, but these did not change the fact that he was a *very credible witness.*

[16] This Court's contemporaneous trial notes contain, among others, the following separate notations made during the testimony of these three witnesses: *"Discredit, Not Credible! Stupid Answer. Evasive. Lying!! Fudging on Many Answers, Smart Alek! Lied About This On Direct."*

[17] AD 3-3 was issued June 5, 1978 (with an effective date of February 6, 1978). Subsequently, it was amended March 15, 1981;

this driver safety program, employees could not be certified for "primary driver positions" if they had certain specified health conditions, including:

> c. Have no established medical clinical history or medical diagnosis of diabetes mellitus currently requiring insulin for control.
>
> . . .
>
> j. Have distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses, or visual acuity separately corrected to better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at lease 70 degrees in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green and amber.[18]

13. Joseph Tillotson, the City Safety Manager who drafted the first version of AD 3-3, testified that this driver safety program was "an attempt to improve the City's accident record and upgrade the quality of City drivers"; that the health conditions listed in AD 3-3 were, in essence, copied by Tillotson from Department of Transportation physical standards which applied only to interstate motor carriers and over-the-road truck drivers;[19] but that

---

reissued May 17, 1984; reissued January 1, 1986; reissued July 10, 1989; and amended October 1, 1989.

[18] Before the January 1, 1986 amendment, the visual restriction of AD 3-3 read:

> Lack of distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses, or visual acuity separately corrected to 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal meridian in each eye and the ability to recognize colors or traffic signals and devices showing red, green or amber.

[19] These DOT regulations have no application to City drivers or to vehicles which weigh less than 10,000 pounds. However, Tillotson

he "had no information concerning the number of accidents caused by people who had the physical conditions listed in AD 3-3." [20]

14. Similarly, James Gresham, who served as the City Safety Manager for four years after Tillotson (March 1982-September 1986), testified that there was no documentation or research "to show that persons with the physical disabilities listed in AD 3-3 had more driving accidents than persons without these conditions"—and, Wendell Moore, Assistant Director of the Civil Service Department, admitted that the City had made no finding that the physical requirements of AD 3-3 were "bona fide occupational qualifications." [21]

15. In addition, Joseph Tillotson described the "artificial limitations" placed upon the implementation and application of AD 3-3. Specifically, because the City's "health clinic could only handle 4000 physical examinations" over a two-year period, the various departments were asked to "submit job classifications to be covered by AD 3-3"—and these lists "were then cut down to 4000," the number of physicals the City could accommodate, by late 1977 or early 1988.[22] In this arbitrary manner, approximately 138 City jobs were designated as "primary diving positions" covered by AD 3-3.[23]

---

testified that he discussed these DOT standards with the City's physician and with "several doctors" at Southwestern Medical School and the conclusion was that "the over-the-road bus and truck regulations were the best we could come up with." Dep. 11 (Tillotson), pp. 90-94.

[20] Dep. 11 (Tillotson), pp. 80-81, 93-94, 98-100, 125-26; Pl.Exh. 5-7.

[21] Dep. 1 (Gresham), p. 75. See also Tr. 19, pp. 62-63; Pl. Exh. 12.

[22] Dep. 11 (Tillotson), pp. 93-94, 99-100, 110; Pl.Exh. 507. There was no testimony—either by Tillotson or any other witness—that this process had been approved or cleared by any doctor with the City or with Southwestern Medical School.

[23] Originally, employees in "primary driving positions" were to be given physical examinations every two years. However, this

D. *Handicapped Employees*

16. At all times relevant to this case, the City received federal financial assistance, including Revenue Sharing Funds. The City's Water Department, where both Chandler and Maddox were employed, also received federal financial assistance during this period.[24]

17. Contrary to the City's claim that it is not subject to Section 504 of the Rehabilitation Act of 1974: (i) when Chandler and Maddox were hired by the City, they were both given "Nondiscrimination on the Basis of Handicap" documents that stated, "*The City of Dallas is subject to Section 504 of the Rehabilitation Act of 1973*";[25] and (ii) AD 3-23, issued July 1, 1979 and entitled "Recording Data—Handicapped Employees," states that its purpose was to "outline administrative procedures for capturing and recording data pertaining to handicapped employees of the City of Dallas to comply with the Federal Rehabilitation Act of 1973."[26]

18. *The City offered no explanation of why these misrepresentations were made* to Chandler at the time of his employment in 1981, and to Maddox at the *time* of his employment in 1982, if Chandler and Maddox were not, in fact, protected by the Rehabilitation Act of 1973.

19. Under City Personnel Rules, the plaintiffs do have a "property right" in their positions as City employees, and they may not be discharged or demoted without valid reason. These Personnel Rules specifically provide that "City Management shall not . . . discriminate" against an

---

requirement was discontinued for about three years because the City had only one doctor at its medical clinic during this period. Dep. 11 (Tillotson), p. 114.

[24] Pl. Exh. 13-15.

[25] AD 3-3 and AD 3-23 are administrative directives issued by the Dallas City Manager under authority provided by the City Charter, Chapter VI, Section 2, "Powers and Duties of the City Manager."

[26] Pl. Exh. 16, 23, 75.

individual or "otherwise adversely affect an employee's status "because of the individual's race, color, age, religion, sex, national origin, *handicap*, political opinion, or affiliations." Similarly, under the City's Civil Service Rules, there is to be no discrimination on the basis of physical disability except where physical requirements constitute a bona fide occupational qualification.[27]

E. *Plaintiff Lyle S. Chandler*

20. On June 25, 1977, Chandler was diagnosed as having diabetes mellitus which was severe enough to require insulin for control. Since then, he has controlled his type I diabetes without any significant problems.

21. Chandler was not handicapped by his diabetes. The Texas Department of Public Safety did not place any restriction on Chandler's driver's license because of his diabetic condition.

22. Chandler's diabetes did not have any adverse effect upon his employment in 1977. He continued working about 60 hours per week as a supervisor for a manufacturer of electrical equipment (including high voltage test sets). During this five-year employment with this company (1974-1979), Chandler had no on-the-job accidents.

23. Chandler's diabetes did not prevent him from obtaining a better job in 1979. For the next two years (1979-1981), he worked as a manager for Tuffway Class, where he supervised employees tempering glass (by heating and rapidly cooling it). Chandler's duties included the use of electrical equipment (saws, sanders, etc.). Chandler also drove vehicles for the company, and he had no on-the-job accidents. Chandler left this job because of the "possibility of advancement" with the City of Dallas.

24. *Chandler's diabetes did not prevent the City from hiring him as an electrician in 1981 with full knowledge*

---

[27] Pl. Exh. 11 (Personnel Rules), § 34-11(c), 34-35(b); Pl. Exh. 12 (Civil Service Rules), § 4.

of his diabetic condition. When Chandler applied for City employment, he completed an application and was given a physical examination by a City doctor. Chandler's diabetic condition is shown on his application, and the doctor's examination noted that his diabetes was *"apparently well-controlled."* [28] Chandler specifically requested permission to drive for the City in his employment—and no one with the City advised Chandler that his diabetes would prevent him from doing so.[29]

Chandler IS QUALIFIED to drive:
November 1981-January 1985

25. Chandler was hired by the City as a T-9 Electrical Repairer in the Water Department, and he began work on November 30, 1981. As an electrician, Chandler's duties required him (i) to perform work at three different water purification plants and several remote metering locations, and (ii) to drive about 5 hours a week in traveling between these locations.

26. The City's driver safety program (AD 3-3) became effective on February 6, 1978—*almost 3¾ years before Chandler was hired.* Despite this, and despite the City's knowledge of Chandler's diabetes, it hired Chandler to work as an electrician, a job that required him to drive in order to perform his duties at different locations.

27. During the period from November 1981 through January 1985, Chandler did not have any traffic accidents; his attendance was excellent; and he received "good" and "outstanding" performance reviews.[30] As discussed below,

---

[28] Pl. Exh. 30, 32.

[29] Chandler also listed his diabetic condition on the form entitled *"Nondiscrimination on the Basis of Handicap"*, which the City used to comply with § 504 of the Rehabilitation Act of 1973. Pl. Exh. 23, 75.

[30] Pl. Exh. 25-28. This Court specifically *and emphatically* discounts the contrary testimony by Tony Hankins, Charles Stringer

the medical evidence at trial clearly showed that Chandler's diabetes was well-controlled and that he could safely drive for the City.

Chandler IS NOT QUALIFIED to drive:
January 1985-January 1990

28. In November of 1984, Chandler applied for promotion to a newly-created T-10 position, Electrical Repair Supervisor. However, the City refused to allow Chandler to take the required civil service test. This was solely because he was diabetic [31]—and because, under AD 3-3, Chandler was not qualified to hold a "primary driving position" (like as the T-10 job for which he was applying).

29. Because of this, Chandler obtained a copy of AD 3-3 in December 1984. He learned, for the first time, that AD 3-3 had been revised in May of 1984; that his T-9 Electrical Repairer job had also been listed as a "primary driving position" in the May 1984 revision; and that, according to the City, Chandler was no longer qualified to drive as a T-9 electrician—*even though he had safely driven for the City in that T-9 position for the past three years (since November 1981).*[32]

---

and Joe Royal—that Chandler's attendance was "poor" or "eratic," that he sometimes "used the wrong tools," that his safety habits "were not very good," that he was "insurbordinate"—because that testimony was *not credible.* It also rejects the testimony by Charles Stringer that "he never saw Chandler drive" because this testimony was false.

[31] Pl. Exh. 44. Chandler's diabetic condition, which disqualified him from any "primary driving position," was the *sole reason* that the City "would not allow him to take a promotional exam for the position of Electrical Repair Supervisor T-10." *Chandler,* 958 F.2d at 87.

[32] Chandler's duties as an electrician required him to work with high voltage electrical equipment. The City's witnesses—particularly Charles Stringer—were not able to explain why they permitted Chandler to perform such high-risk work during the same period that (according to the City) it was too dangerous for Chandler to drive because of his diabetes.

30. After learning these things, Chandler discussed them with his supervisors and with City employees involved in administering the drivers safety program. He complained to them that AD 3-3 was discriminatory. Because of these complaints, Chandler's supervisors—for the first time—realized that Chandler's T-9 job was a "primary driving position"; accordingly, they scheduled Chandler for a physical examination by the City physician, Dr. Mary Jane Kelly. On January 23, 1985, Dr. Kelly found that Chandler was not qualified for the T-9 job (a "primary driving position") because of one reason: Chandler was an insulin-controlled diabetic.

31. On January 25, 1985, the City advised Chandler's supervisors in the Water Department that he could not drive a motor vehicle on City business because of his diabetes. Pursuant to this directive on January 29, 1985, Chandler was restricted from operating City vehicles because of his diabetic condition.

32. At first, there was some question about whether Chandler would be demoted because of his diabetic condition.[33] Chandler's supervisors then decided that Chandler "would be permitted to keep his T-9 position," and that he would just "not be allowed to drive." This meant that Chandler had to ride with some other employee to the different job locations.[34]

33. *Chandler complained!* He complained to *all* of his supervisors, including Tony Hankins, Pat Greenlee, Charles Stringer, Joe Royal and Herb Phelan, as well as to persons in the City Personnel Department.[35] Chandler complained

---

[33] Dep. 11 (Tillotson), p. 133 (demotions caused by AD 3-3 would be treated as a "disciplinary action" because that's "the only vehicle we have to demote").

[34] Pl. Exh. 36.

[35] Chandler testified that one supervisor (Lowell Cason) became very angry at these complaints and asked: "*Are you telling me what to do?*"

that AD 3-3 was discriminatory. He made many similar statements to his co-workers.

34. Finally, on July 22, 1985, one of Chandler's supervisors—Herb Phelan—requested that Chandler be granted a waiver of the diabetic condition standards of AD 3-3. This request was supported by an examination by Chandler's personal physician and by Chandler's statement that his health was excellent, that he had been a licensed Texas driver for over 20 years, and that he had driven City vehicles for over three years in his T-9 position. On July 27, 1985, the requested waiver was denied by Mark Ferraro, Risk Manager, on these grounds: *"Waivers are not granted for insulin-controlled diabetics."* [36]

35. On September 9, 1985—*at the request of Chandler*—Randy Stalnaker, Manager of Personnel Services, asked the City Attorneys Office if AD 3-3 was discriminatory. Specifically, Stalnaker advised an Assistant City Attorney that Chandler had been restricted from driving under AD 3-3 solely because he was an insulin-dependent diabetic—and asked whether "it is proper to restrict Lyle [Chandler] from driving under the laws protecting the handicapped." [37] Apparently, there was never any response by the City Attorneys' Office.

36. *Chandler's duties as a T-9 electrician required him to work on a daily basis with high voltage electrical equipment. No one with the City gave Chandler any explanation of why he was permitted to continue to perform this high-risk work*—even though (according to AD 3-3) it was, supposedly, much too dangerous for Chandler to drive a City vehicle for some 5 hours each week because he was an insulin-controlled diabetic.

---

[36] Pl. Exh. 40.

[37] Pl. Exh. 41.

Chandler's lost promotions:
January 1985 and May 1989

37. As a T-9 Electrician Repairer, Chandler had two possible opportunities for promotion: the T-10 Electrical Repair Supervisor and the Water Maintenance Supervisor 13.[38] However, after January 1985, Chandler was precluded by AD 3-3 from applying for promotions to either of these jobs or to any other "primary driving position."

38. In November 1984, there was an opening for a *T-10 Electrical Repair Supervisor* (a newly created position). Chandler was not permitted to take the promotional exam for this job, a "primary driving position", because of his diabetic condition. Chandler was more qualified for this T-10 supervisory position than Dan Bostrom, who received the promotion on January 22, 1985.[39] Specifically, the credible evidence established that Chandler was more qualified because of the length of his experience as a T-9 Electrical Repairer, his supervisory experience, his non-city electrical experience, his past performance ratings with the City, his attendance, and the fact that he had already been performing many of the duties of this T-10 position prior to the selection of Mr. Bostrom.[40]

39. In May of 1989, there was an opening for the position of *Water Maintenance Supervisor 13*. Chandler tried to apply for this promotion, but was told that he could not because it was a "primary driving position." Chandler was, in fact, more qualified for this level 13

---

[38] Pl. Exh. 44.

[39] This Court credits Chandler's testimony that, "*after being supervised by Bostrom*, he knows that he had more experience, electrical ability, better attendance, more seniority, and better supervisory skills than Bostrom." See Pl. Exh. 174 (Bostrom's personnel file).

[40] The evidence also established (i) that Chandler should have received a promotion to T-10 Electrical Supervisor on September 11, 1985, when a less-qualified employee received this promotion, and (ii) that the T-10 position was filled by promotion at least five times from January 22, 1985 until the trial (August 1990).

supervisory position than Joe Royal, who received the promotion on May 31, 1989. Specifically, the evidence established that Chandler should have received the earlier promotion to T-10 Electrical Repair Supervisor—and that, if this had taken place, Chandler would have been more qualified than Joe Royal based upon Chandler's experience as a T-10 Supervisor, his overall supervisory experience, his performance ratings, his safety record, his attendance, and Royal's disciplinary and driving record.[41]

retaliation and its effects

40. In the fall of 1985, Chandler told his supervisors that he would be forced to file a "handicap discrimination suit" because AD 3-3 discriminated against insulin-controlled diabetics. In response, Chandler was told that he should see a psychologist because "he was not acting rationally" and because "his protests against AD 3-3 were not appropriate."

41. Because of this, Chandler did consult a psychologist, Dr. Alvin Smith. Chandler saw Dr. Smith weekly over the next 16 months (August 1985-February 1987). At trial, Dr. Smith's unrebutted and very credible testimony was that Chandler suffered from *dysthymic disorder*, a moderate depression; that this condition resulted from the City's treatment of Chandler (i.e., refusing to let him continue to drive and barring him from promotion); that this was "probably the worse thing you could do to a high achiever" like Chandler;[42] and that the City's actions

---

[41] Charles Stringer's testimony that Royal "was more qualified than Chandler" was, *to say the very least*, not credible. In contrast to Chandler's record: (i) Royal had been suspended twice, the first for 3 days for "using abusive language and threatening a supervisor" and the second for 5 days for fighting; and (ii) Royal also had two on-the-job accidents. Royal's testimony that he could remember only one accident and only one disciplinary suspension was not credible. See Pl. Exh. 137 (Royal's personnel life).

[42] On cross-examination, the City asked Dr. Smith about Chandler's "other emotional problems," such as his divorce in 1985. In

caused serious emotional distress to Chandler.[43] Upon Dr. Smith's recommendation, Chandler was placed on disability leave by the City.

42. Chandler continued to complain to his supervisors about AD 3-3. Then, in November and December of 1985, Chandler filed two separate charges of handicap discrimination against the City: (i) a November 15, 1985 complaint with the Texas Commission on Human Rights; and (ii) a December 15, 1985 complaint with the Director of Revenue Sharing Office.[44] Finally, on December 20, 1985, Chandler filed this suit against the City of Dallas, alleging—on behalf of himself, his co-plaintiff (Maddox), and the class—that the City's AD 3-3 driver safety program violated:

> . . . the Rehabilitation Act of 1973, the Revenue Sharing Act of 1982, the Texas Commission on Human Rights Act, the 14th Amendment and 42 U.S.C. § 1983.[45]

43. In January of 1986, shortly after this lawsuit was filed, one of Chandler's supervisors (Charles Sylvie) instructed Chandler that *"he was not to discuss AD 3-3 with anyone."* Then, on March 25, 1986, *Chandler was demoted to the position of T-7 Electrical Repairer.* The credible evidence established that this demotion—sup-

---

response, Dr. Smith testified—based upon his 50-75 hours in sessions with Chandler—that the main cause of stress to Chandler was the fact that "he was not treated fairly at work" by the City. Pl. Exh. 61-73, 140.

[43] Similarly, Chandler testified that Dr. Smith's evaluation was that "he was extremely angry" at the City for its treatment of him, that "he was consumed by this one issue" (AD 3-3), and that "he had difficulty focusing on his job or outside life because of his feelings about the discrimination."

[44] This complaint alleged a violation of the Revenue Sharing Act of 1982, 31 U.S.C. § 6701.

[45] *Chandler*, 958 F.2d at 87. Amended complaints were filed on June 5 and December 31, 1986 and on May 31, 1989.

posedly for "violation of safety rules," for "insubordination," and for "absenteeism"—was, in fact, in retaliation for Chandler's continued opposition to AD 3-3 and for the filing of this discrimination suit.

44. *The supposed "violation of safety rules"* took place sometime in January 1986, when Chandler had an on-the-job accident.[46] Specifically, Chandler accidentally removed a "hot electrical lead" instead of a "low lead"; he quickly "shorted it in the ground to trip the circuit breaker"; but his hand was burned to the extent it required a bandage; and Chandler spent about three hours at Parkland Hospital's emergency room and received physical therapy for the injury for the next four weeks. The credible evidence established that this accident would not have occurred but for the City's discrimination against Chandler. Specifically, Dr. Alvin Smith, Chandler's psychologist, testified that this January 1986 accident was caused by Chandler's *dysthymic disorder* (which, as discussed above, resulted from the City's discrimination against Chandler). And, Chandler testified convincingly that this accident happened "because he was thinking about this case." [47]

45. *The supposed "insubordination"* by Chandler was not shown by any credible proof. Basically, the evidence presented by the City was this: (i) Charles Stringer's general testimony that Chandler "has had a history of being subordinate" and that "insubordination" was one of the three reasons for Chandler's demotion in March 1986; and (ii) Tony Hankin's testimony that Chandler "did not take instructions from him" and he "used the wrong tools a couple of times." *This testimony was not credible.* Moreover, it was contradicted by the "generally outstanding" performance evaluations Chandler received—and by

---

[46] Chandler's only other job accident before this was in early 1982 during his probationary period with the City. Then, Chandler's "drill bit grabbed," and he sprained his right thumb.

[47] Chandler's explanation was also supported by the fact that he has never had an accident caused by his diabetes.

Chandler's credible testimony that he was not insubordinate. Accordingly, the credible evidence established that the supposed "insubordination" was merely a pretext for Chandler's supervisors to punish him for his continued opposition to the discrimination caused by AD 3-3.

46. *The supposed "absenteeism"* by Chandler was disproven by the evidence. One City witness, Tony Hankins, testified that "Chandler's attendance was eratic" and he "would leave, feeling sick"—but his testimony was not credible. Moreover, neither Hankins nor any other City witness explained why Chandler received high performance evaluations ("generally outstanding") if his attendance was poor. And, as discussed below, these "absenteeism" charges were clearly baseless insofar as they resulted from the sick leave and short-term disability leave taken by Chandler.

47. The demotion of Chandler—because of an accident caused by his preoccupation with the discrimination against him (*the supposed "violation of safety rules"*); because of his opposition to AD 3-3 (*the supposed "insubordination"*); and because of the sick leave and disability leave Chandler took at the direction of his psychologist (*the supposed "absenteeism"*)—was, in fact, retaliation against Chandler because of his opposition to AD 3-3.

48. The retaliatory demotion of Chandler took place on March 25, 1986, when he was reduced to the position of T-7 Electrical Repairer. Chandler appealed this demotion on the grounds that it was discriminatory, retaliatory and unwarranted punishment. However, at the hearing, Chandler was not permitted to introduce any evidence concerning AD 3-3 or the discrimination and the retaliation against him. Chandler's appeal was rejected, and Chandler is still in the T-7 electrician position. The credible evidence presented at trial established that Chandler's demotion would not have occurred but for the City's discrimination against Chandler and its retaliation because of his opposition to AD 3-3.

the short-term disability controversy

49. In April 1986, following his demotion, Chandler was still receiving treatment for his *dysthymic disorder* from Dr. Alvin Smith. Chandler had used all of his sick leave, so he applied for short-term disability. On April 11, 1986, this request was approved and Chandler was granted short-term disability for a period of four weeks. This short-term disability was extended for another four-week period, to June 8, 1986.[48]

50. Chandler applied for additional short-term disability leave, but—despite the fact that his request was supported by Dr. Smith—Chandler's application was denied. On June 17, 1986, Chandler filed an appeal from this denial.

51. The City took no action on Chandler's appeal.[49] Instead, Chandler was instructed to return to work by July 23, 1986—and was warned that he would be discharged if he did not. However, Dr. Smith had not (*and would not*) release Chandler to return to work, so he refused to do so.[50] The City did not fire Chandler for refusing to return to work in July 1986.

52. Six months later, on January 21, 1987, the City again threatened Chandler with dismissal if he did not return to work. A dismissal hearing was set for February 5, 1987.[51] However, Dr. Alvin Smith concluded that Chandler was now able to return to work, and released him from further treatment. Chandler did return to work on February 4, 1987[52]—as a T-7 Electrical Repairer.

---

[48] Pls. Exh. 60, 62.

[49] Indeed, *for over three years*, the City failed to take any action on Chandler's appeal from this denial of additional disability leave.

[50] Pl. Exh. 72, 83, 84, 85.

[51] Pl. Exh. 85, 87.

[52] Pl. Exh. 84, 86.

53. Over two years later, on May 12, 1989, Chandler's appeal from the denial of additional short-term disability leave was granted.[53] No explanation was given for this delay in finding that Chandler's short term disability claim was valid—although one supervisor told Chandler "that the City Attorney who handled the appeal just took this long to make a ruling."

54. Despite the effects of this unconscionable delay upon Chandler, the evidence *did not* establish that the City discriminated or retaliated against Chandler either in (i) the denial of his claim for extended short-term disability benefits, or (ii) the delay in processing his appeal. However, as discussed above, there was some unwarranted testimony at trial about Chandler's supposed *absenteeism*—which was attributable to the City's improper denial of additional disability leave, and to the threat that Chandler would be fired if he did not return to work in July 1986 (against his doctor's advice).

Chandler IS QUALIFIED to drive:
January 26, 1990

55. In September 1989, Chandler learned at a safety meeting that AD 3-3 was being amended again—effective October 1, 1989—and that it would be possible for insulin-controlled diabetics to obtain waivers for "primary driver positions." Chandler immediately applied for such a waiver.[54]

56. Chandler heard nothing about his waiver request. In November 1989, he started calling the Risk Management Department for information, but still no action was taken. Eventually, in January 1990, Chandler was given a physical examination—and Dr. Mary Jane Kelly (the same City doctor who examined Chandler in January 1985), concluded that Chandler should be allowed to

---

[53] Pl. Exh. 89.

[54] Pl. Exh. 90.

operate a City vehicle as a "primary driver," and certified that Chandler's insulin-controlled diabetes would cause "no increased risk." [55] Finally, on January 26, 1990—*one day after pretrial materials were filed in this case*—Chandler's waiver request was granted, and he has been permitted to drive on City business since then. *Chandler has not had any accidents while driving for the City.*

57. After receiving his waiver, Chandler learned in February 1990 that his position as T-7 Electrical Repairer was no longer a "primary driving position." [56] Instead, on January 26, 1990, the T-7 and T-9 jobs had been redesignated as "secondary driving positions," as they had been classified prior to November 1984, before Chandler was removed from driving. This meant that the physical requirements of AD 3-3 had no application to either job that Chandler had held for the City. Chandler could drive again in the same jobs he had held for years—the same jobs in which he was not permitted to drive from November 1984 through January 1990 because of his diabetes mellitus.

Chandler—miscellaneous

58. The expert testimony and Chandler's medical history also established that he does not present a safety risk while driving for the City. For example, both Dr. Philip Raskin, a recognized expert in endocrinology, and Dr. Stephen Aranoff, Chandler's treating endocrinologist, concluded that Chandler's diabetes was "well-controlled" and that he could safely drive for the City. Specifically, Dr. Aronoff testified that Chandler could drive safely for the City because (i) his blood sugar level was well-

---

[55] Pl. Exh. 139.

[56] Despite this redesignation of Chandler's job as a "secondary driving position," Chandler will still be barred from promotion to a higher "primary driving position" unless he is granted a waiver under AD 3-3.

controlled, (ii) his Type I diabetes was stable, and (iii) Chandler had safely driven for the City from 1977-1985. Similarly, Dr. Mark Leshin (who was listed as a possible expert witness *for the City* in its pretrial material) found that Chandler is capable of safely operating a motor vehicle "without increased risk to the City of Dallas because of his condition [diabetes mellitus]." [57] And, as noted above (¶ 56), in January 1990 the City's own doctor (Dr. Mary Jane Kelly) found that Chandler could safely drive in his job with no increased risk to the City.[58]

59. Despite the fact that two City experts (Dr. Leshin, Dr. Kelly) both found that Chandler could drive safely in his job, the City attempted to discredit the two experts for the plaintiffs (Dr. Raskin, Dr. Aranoff) by cross-examining them about two "major diabetic reactions" which Chandler supposedly experienced while he was at work. The first was on January 25, 1985,[59] and was "so severe" that Chandler was transported to Parkland Hospital. The second was on August 1, 1990,[60] when Chandler was again taken to this hospital for treatment.

---

[57] Pl. Exh. 137.

[58] The City's proposed findings that, *during the period that Chandler "was permitted to drive as a primary driver,"* he had "numerous hypoglycemic reactions" during which he became "addled or confused"—and his diabetes was "badly out of control"—are distortions of the expert testimony, and they are specifically rejected by this Court. See Defendants' Proposed Amended and Additional Findings and Conclusions, ¶¶ 13-15 (June 22, 1992).

[59] *January 25, 1985* is the day that Chandler's supervisors told Chandler that he could no longer drive a motor vehicle on City business because he was an insulin-controlled diabetic. The Court credits Chandler's explanation that this reaction took place because he "just got drunk" after learning of the City's decision (and that he never lost consciousness). The expert testimony supported Chandler's explanation.

[60] *August 1, 1990* was just five days before trial in this case (which began August 6, 1990). The Court credits Chandler's testi-

60. However, the attempt by the City did not detract from the opinions of the experts who—with full knowledge of both incidents—testified *positively* that Chandler's diabetes was well-controlled and that he could safely drive in his work for the City. For example, Dr. Aronoff testified that this January 1985 attack was Chandler's "first major reaction since 1977, when his diabetes was first diagnosed," and that it occurred because Chandler "stayed out late and did not eat breakfast."

61. Of course, the City's attempt to discredit the plaintiffs' experts because of Chandler's two "major diabetic reactions" was unconvincing for another reason: the City failed to offer any explanation of why a "primary driving position" waiver was granted to Chandler in January 1990 —and why he is still permitted to drive for the City—if, the City really believes (contrary to its own doctor) that Chandler's driving presents unacceptable risks because of these two isolated and explainable diabetic reactions.

62. At trial, the City argued that it did not deny employment to Chandler because of his diabetes—and that he could have applied for any non-driving position. However, the evidence clearly established that the City:

> (i) concluded that Chandler *could* safely drive from November 1981-January 1985, despite the fact that he was an insulin-controlled diabetic; but
>
> (ii) concluded, instead, that Chandler *could not* safely drive from January 1985-January 1990, solely because of his unchanged diabetic condition; but then
>
> (iii) concluded, once again, in January 1990 that Chandler *really could* drive safely for the City despite his insulin-controlled diabetes.

---

mony that this attack occurred because "stress affects [his] blood sugar level" (and that he did not lose consciousness). Again, the expert testimony established that stress was the cause of the August 1, 1990 attack.

F. *Plaintiff Adolphus Maddox*

63. When he was 12 years old, Maddox was shot in his left eye with a pellet from a BB gun.[61] This eye was permanently damaged, and his visual acuity is approximately 20/60 in his left eye. However, his right eye acuity is 20/15, and *Maddox has 20/10 visual acuity using both eyes.*[62]

64. Maddox is not handicapped by the loss of sight in his left eye. No restrictions have been placed on his drivers license by the Texas Department of Public Safety. Maddox obtained his first Texas drivers license when he was 16, and he qualified for a chauffeur's license when he was 21.[63]

65. The United States Navy did not consider Maddox to be handicapped because of the childhood injury to his left eye. During his 22-year military career, Maddox was assigned to Naval aviation ordinance, where "about 85-90% of [his] time was spent in driving." In particular, Maddox drove dump trucks, pickups, tractor-trailer rigs, mobile electronic carts, military buses, and 16-ton forklifts. He drove vehicles transporting bombs, missiles and nitroglycerin to be loaded onto Naval airplanes. He drove for the Navy in Viet Nam and on the ice in the Antarctic. *Maddox never had any accidents while driving during his 22-year military career.*[64]

---

[61] The BB hit directly in the front of Maddox's left eye, so he has a blind spot. However, using his left eye alone, Maddox can see objects and discern movement with 20/60 vision. And, using both eyes, Maddox can see moving objects on his left side with 20/10 vision.

[62] Pl. Exh. 129.

[63] Maddox's chauffeur license lapsed while he was on active duty for the Navy in Viet Nam.

[64] Maddox not only qualified as a "sharpshooter," he competed as a member of the official "pistol and rifle" team for his Navy unit. Maddox also received 28 medals and letters of commendation during his military career.

66. After Maddox left the Navy, he worked as a forklift driver, as a security guard, and for the Fairmont Hotel in Dallas (where he parked cars "for about two years").

67. *Maddox's left eye injury did not prevent the City from hiring him in 1982 with full knowledge of this condition.* Maddox's application and his first physical by a City physician both note the permanent disability to his left eye *and* his 20/10 vision with both eyes.[65] Maddox specifically requested permission to drive for the City in his employment—and no one with the City advised Maddox that the condition of his left eye would prevent him from doing so.

Maddox IS QUALIFIED to drive:
November 1982-April 1985

68. Indeed, when Maddox started work on November 29, 1982, the City considered that he was qualified to drive. Specifically, Maddox began as a "day laborer," and this Court credits Maddox's testimony that he was *required* to drive about 20 hours a week in this position—despite the fact that the driver safety program (AD 3-3) had already been in effect for over 4¾ years (since February 6, 1978).

69. Maddox's eyesight did not prevent him from obtaining a better job in 1983. On July 20, 1983, Maddox was promoted to a T-7 Plant Mechanic position in the Water Department. For the next 19 months (until April 29, 1985), Maddox was allowed to drive to perform his T-7 duties for the City.[66] During this period, Maddox did not have any traffic accidents; he received very good

---

[65] Pl. Exh. 94, 101. Maddox noted the damage to his left eye on the form entitled *"Nondiscrimination on the Basis of Handicap,"* which the City used to comply with § 504 of the Rehabilitation Act of 1973.

[66] Pl. Exh. 102-105.

performance reviews; and he received an academic achievement award for completing his college education.[67]

Maddox IS NOT QUALIFIED to drive:
April 29, 1985-March 9, 1990

70. In April of 1985, Maddox applied for promotion to a T-9 Plant Mechanic position (the normal line of progression for his T-7 job). As a result, Maddox was scheduled for a driver safety physical.

71. On April 22, 1985, the City's physician, Dr. Mary Jane Kelly, found that Maddox was not qualified for the T-9 job (a "primary driving position") because of one reason: the incorrectable visual acuity in his left eye "worse than 20/40 Snellen," as specified in AD 3-3.[68]

72. On April 24, 1985, Maddox's supervisors in the Water Department were advised that he could not drive a motor vehicle for the City because of the incorrectable visual acuity in his left eye and that he must be assigned to a non-driving position.

73. Despite the April 22 physical and the April 24 directive, Maddox continued to drive for the City as a plant mechanic for several days. Then, on April 29, 1985, Charles Stringer advised Pat Greenlee, Maddox's immediate supervisor, that Maddox could no longer drive a City vehicle because of AD 3-3.[69]

74. Maddox could not understand why he was no longer permitted to drive in his job as plant mechanic even though he had done so—without any on-the-job accidents [70]—for almost 2½ years. When Maddox asked

---

[67] P. Exh. 98-100, 116, 118, 178.

[68] Pl. Exh. 10.

[69] Pl. Exh. 104, 105.

[70] On cross-examination, Maddox was questioned about several non-work car accidents he had from August 1977 (5 years prior to

his supervisors, "they had no answers" and simply told Maddox that "they were pleased with his performance to date." Pat Greenlee told Maddox "that he just could not drive any longer"; Greenlee also said that Maddox "might be terminated because he could not meet the physical requirements of AD 3-3"—or that, at the very least, Maddox could "never be promoted" from the T-7 plant mechanic position.

75. *Maddox complained,* but to no avail. Finally, Maddox filed charges of handicap discrimination with the Texas Human Rights Commission and with the Director of Revenue Sharing.[71] Then, on December 20, 1985, Maddox joined Chandler in filing this class action challenging the legality of AD 3-3.

Maddox's lost promotions

76. Maddox, of course, did not receive the promotion to the T-9 Plant Mechanic position that he applied for in April 1985. Instead, on May 3, 1985, David Bell was promoted to this opening. The credible evidence established that Maddox was more qualified for this T-9 position and that, but for AD 3-3, he would have received this promotion. Specifically, Maddox had higher test scores on the T-9 examination than Bell (or any other applicant); he had more mechanical experience (including his

---

his City employment) to 1988—including one where Maddox was struck by a "hit-and-run driver" (the *City* police found Maddox was "not at fault"). ***The Court credits Maddox's testimony that he was at fault in two minor accidents in 32 years of driving.*** It also discredits the City's apparent argument—that Maddox's accident record shows he was not a safe driver—for these reasons: (i) the City permitted Maddox to drive in his job from November 1982-April 1985 even though it knew about most (if not all) of these accidents; and (ii) in March 1990, when the City certainly had knowledge of *all* of these accidents through Maddox's deposition and other pretrial discovery, the City permitted Maddox to start driving again for the City despite these minor accidents.

[71] Pl. Exh. 120, 121.

years in the military); and his driving safety and disciplinary records were flawless.[72]

77. In 1988, Maddox applied for another T-9 mechanic opening.[73] He was told by his supervisors that "*they wanted him, but could not [award him the job] because of AD 3-3.*" After this, Maddox did in fact, act as a T-9 mechanic for the City by filling in for T-9's who "were sick or on vacation." [74]

the retaliation

78. Maddox also complained about the discrimination against him (although he was not as vocal or persistent as Chandler). This Court specifically credits the testimony of Maddox that he was threatened by his supervisors with discharge because of his continued opposition to AD 3-3 and his association with Chandler as a plaintiff in this lawsuit challenging the driver safety program.[75]

Maddox IS QUALIFIED to drive:
March 9, 1990

79. Under AD 3-3, there was no way for Maddox to obtain a waiver that would permit him to continue to drive. His deficiency, although it did not affect Maddox's ability to drive safely, was an absolute bar to his promotion to any "primary driving position."

---

[72] Pl. Exh. 49. Pat Greenlee, Maddox's supervisor, testified that Maddox *was qualified* to be a T-9 Plant Mechanic.

[73] This promotion, too, went to a lesser-qualified person. So did some 20 other T-9 promotions that were filed during the period from May 1985 to the date of trial (October 1990).

[74] The testimony of Horace Marshall, one of Maddox's supervisors —that Maddox "only rarely acts as a T-9"—was not credible. Similarly, for reasons previously stated, this Court discredits the testimony of Charles Stringer concerning Maddox.

[75] Tr. 15, pp. 75-77.

80. On January 26, 1990—*one day after the pretrial materials were filed in this case*—Maddox's T-7 Plant Mechanic position was "redesignated" so that it was no longer a "primary driving position" under AD 3-3. Instead, it was once again a "secondary driving position," just as it had been classified prior to April 1985, when Maddox was disqualified from driving.

81. On March 9, 1990, Maddox began driving again for the City. This meant that the physical requirements of AD 3-3 no longer applied to Maddox's T-7 position, and he could once more drive in the same job that he held for years—the same job in which he was not permitted to drive (from March 1985-March 1990) because of the childhood injury to his left eye. However, despite this redesignation of Maddox's job as a "secondary driving position," Maddox is still barred from promotion to a "primary driving position"—and he is still prohibited from obtaining a waiver under AD 3-3.

Maddox—miscellaneous

82. The expert testimony and Maddox's employment history also establish that he does not present a safety risk while driving for the City. Specifically, Dr. Paul Freeman, an expert in the field of "low vision," testified—very clearly and very credibly—that the visual restrictions of AD 3-3 were not related to safe driving or lower accident rates; that these restrictions discriminate against persons with vision problems who can safely operate a motor vehicle; that Maddox's loss of visual acuity in his left eye did not present a risk to the City or to Maddox; that Maddox's visual acuity and peripheral vision are, in fact, better than required for safe driving; and that Maddox, whose vision was "better than 20/20" using both eyes, can safely drive in his duties for the City.[76]

83. Dr. Freeman, who examined Maddox, also testified about the examination performed on Maddox by Dr.

---

[76] Pl. Exh. 131-133, 143.

James Copps on November 13, 1989. Like Dr. Freeman, Dr. Copps' opinion was that "Maddox can drive safely" and that his visual acuity "was better than 20/20." [77]

84. In contrast, the testimony of the City's expert, Dr. James Sheedy—*who conducted no examination of Maddox*—was not credible. Dr. Sheedy, who has testified as an expert witness in same 20 cases—only once for a plaintiff, the remainder "for local governments in support of [their] visual standards"—testified that AD 3-3 was reasonable; that it comes "from ICC regulations for interstate truck drivers"; and that, even though Maddox had no on-the-job accidents, *he did not think that Maddox should ever be permitted to drive in any job with the City.*[78] At the time Dr. Sheedy gave this testimony, the City was permitting Maddox to drive as a T-7 mechanic because this job had been reclassified as a "secondary driving position." Dr. Sheedy's testimony was not credible and it is totally discounted.[79]

85. At trial, the City argued that it did not deny employment to Maddox because of his impaired eyesight —and that he could have applied for any non-driving position. However, the evidence clearly established that the City:

> (i) concluded that Maddox *could* safely drive from November 1982-April 1985, despite the fact that he had a blind spot in his left eye; but
>
> (ii) concluded, instead, that Maddox *could not* safely drive from April 1985-March 1990, solely because of his unchanged eyesight; but then

---

[77] Pl. Exh. 129.

[78] Pl. Exh. 102, 143.

[79] In his "expert" testimony, Dr. Sheedy simply "relied on the report" of Dr. Copps, and—even though he thought Dr. Copps was "knowledgeable" and his "examination was well done"—he reached completely different opinions from those stated in the Copps report. Pl. Exh. 129.

(iii) concluded, once again, in March of 1990 that Maddox *really could* drive safely for the City despite his damaged left eye, because his vision was better than 20/20 with both eyes.

G. *The Class Certification*

86. In March 1989, following a hearing on the plaintiffs' class certification motion,[80] two narrow subclasses were certified: (i) *first,* City employees who failed the driver's safety physical under AD 3-3 because they were insulin-controlled diabetics; and (ii) *second,* City employees who failed the driver's safety physical because they had the visual impairments listed in AD 3-3.[81] Chandler and Maddox were named, respectively, as class representatives of the *diabetes standard subclass* and the *vision standard subclass.*

87. *These two subclasses were certified only for the purpose of injunctive relief.*[82] This certification did not prevent class members from pursuing claims for any other relief—damages, attorneys fees, or other equitable remedies—either by litigation or other means outside of this class action.

88. This limited certification was proper under Rule 23(b)(2) because the City ("the party opposing the class") had, with respect to AD 3-3, "acted or refused to act on grounds generally applicable" to the two subclasses, thereby making injunctive relief appropriate to prevent the

---

[80] The oral findings and conclusions announced in open court on March 23, 1989 specifically addressed the requirements of Rule 23(b)(2).

[81] City employees with AD 3-3 disabilities other than insulin-controlled diabetes and poor eyesight *were not* covered by the class certification.

[82] Accordingly, this Court would not be required to hold numerous hearings in order to determine the relief, if any, due to each individual member of the two subclasses.

discriminatory application of AD 3-3 to members of the vision standard and diabetes standard subclasses.

89. At trial (October 1990), the evidence established that members of the two subclasses had been adversely affected by AD 3-3—in the same manner as class representatives Chandler and Maddox. Specifically, subclass member Nathaniel Richardson was demoted from his job as a tractor-trailer driver—which he had held for five years—solely because he was an insulin-controlled diabetic. There was similar testimony from Homer Stephens, another member of the diabetes standard subclass,[83] who was demoted from his "primary driving position."

90. On its face, AD 3-3 covers some 138 different City jobs and some 4000 "primary driving positions." Members of the vision standard subclass are blocked from all of these positions by Ad 3-3; and, currently, members of the diabetes standard subclass are precluded from holding these positions unless they can obtain a waiver of the Ad 3-3 requirements.

H. *The Relief*

Based upon these findings, Chandler and Maddox and the two subclasses are entitled to the following relief:

Chandler—damages

90. The evidence established that Chandler would have received additional wages and benefits of $79,220.91 through February 11, 1991 if the City had not discriminated against him—and if, consequently, Chandler had been promoted to the position of Electrical Repair Supervisor T-10 on January 22, 1985, and to the position of Water Maintenance Supervisor 13 on May 31, 1989, and had not been demoted to the position of Electrical Re-

[83] Richardson also testified that his present supervisor "wants to promote me, but he can't because I am not permitted to drive." Pl. Exh. 127, 128; Class Certification Exh. 10; Tr. 13, 88-91, 100-03; Tr. 18, pp. 29-31.

pairer T-7 on March 25, 1986.[84] Chandler will continue to lose additional pay and benefits from February 11, 1991 until he is promoted to the Maintenance Supervisor 13 position.

91. In addition, the evidence established that—because of the City's violation of Chandler's free speech, due process and equal protection rights, and because of the illegal retaliation against him—Chandler experienced severe mental suffering and anguish, physical pain and suffering, humiliation, and harm to his reputation. For these damages sustained through February 11, 1991, Chandler is entitled to recover an additional $100,000.00.[85] Chandler will continue to suffer these damages until he is promoted to the Maintenance Supervisor 13 position.[86]

Maddox—damages

92. The evidence established that Maddox would have received additional wages and benefits of $27,841.96 through February 11, 1991 if the City had not discriminated against him—and if, consequently, Maddox had been promoted to the position of Plant Mechanic T-9 on May 3, 1985.[87] Maddox will continue to lose additional

---

[84] Exhibit 2 to the Plaintiff's Second Proposed Amended and Additional Findings (filed May 14, 1992) indicates that Chandler lost an additional $13,334.61 from February 11, 1991 through May 11, 1992. *However, the final amount of damages that Chandler is entitled to recover from the City cannot be determined until the next Fifth Circuit appeal is concluded.*

[85] This $100,000.00 *is not* duplicated in the $79,220.91 award and, under the circumstances of this case, it is a conservative figure.

[86] Although Chandler seeks an additional $100,000.00 for damages sustained during the period from February 11, 1991 through May 11, 1992, *the amount of additional damages due Chandler cannot be determined until the next Fifth Circuit appeal is concluded.*

[87] Exhibits 4 to the Plaintiffs' Second Proposed Amended and Additional Findings (filed May 14, 1992) indicates that Maddox lost an additional $5,940.00 from February 11, 1991 through May 14, 1992. However, *the final amount of damages owed by the City to*

pay and benefits from February 11, 1991 until he is promoted to the T-9 position.

93. In addition, the evidence established that—because of the City's violation of Maddox's free speech and equal protection rights, and because of the illegal retaliation against him—Maddox sustained mental suffering and anguish, physical pain and suffering, humiliation, and harm to his reputation. For these damages he sustained through February 11, 1991, Maddox is entitled to recover an additional $25,000.00.[88]

injunctive relief

94. The evidence established that, in addition to Chandler and Maddox, other members of the two subclasses have been demoted and barred from promotion solely because of their handicaps. For this reason, both the subclasses and the two plaintiffs are entitled to injunctive relief.

II. *CONCLUSIONS OF LAW*

Based upon the findings of fact,[89] this Court concludes that the City has violated (i) the Rehabilitation Act of 1973, as amended, 29 U.S.C.A. § 794(a) (West Supp. 1992); (ii) the Texas Commission on Human Rights Act, Tex. Rev. Civ. Stat. Ann. art. 5221k, §§ 1.01-10.05 (Vernon 1987 & Supp. 1992); and the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

Maddox cannot be determined until the next Fifth Circuit's appeal is concluded.

[88] **This $25,000.00 *is not* duplicative of the $27,841.96 award and, under the circumstances of this case, is a conservative figure.**

[89] **This court specifically rejects all of the findings of fact proposed by the City and by the plaintiffs that are not consistent with these Findings of Fact.**

A. *The Rehabilitation Act of 1973*

1. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against oeherwise qualified handicapped individuals in programs and activities that receive federal financial assistance.

2. In this case, Chandler, Maddox, the diabetes standard subclass, and the vision standard subclass have proven that:

(i) they are "handicapped";

(ii) they were "otherwise qualified";

(iii) they worked for a "program or activity" which received federal financial assistance; and

(iv) they were discriminated against because of their handcaps.[90]

the plaintiffs are handicapped

3. Chandler and the diabetes standard subclass established that their insulin-controlled diabetes is a physical "impairment which substantially limits" a major life activity, and that they have a record of—and are regarded as —having this impairment.[91] Therefore, they are protected as handicapped individuals under the Rehabilitation Act.[92]

4. Maddox and the vision standard subclass established that their poor eyesight is a physical "impairment which substantially limits" a major life activity, and that they have a record of—and are regarded as—having this impairment. Therefore, they are protected as handicapped individuals under the Rehabilitation Act.

---

[90] *Chiari v. City of League City*, 920 F.2d at 315; *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

[91] 29 U.S.C. § 706(8)(b); 28 C.F.R. § 41.31(b)(4); 40 C.F.R. § 7.25(b); 41 C.F.R. § 60-741.2; 45 C.F.R. § 84.3(j)(2)(i) and (iv).

[92] *Chiari*, 920 F.2d 311 at note 6; *Prewitt*, 662 F.2d at 308-09.

5. The City argues that the plaintiffs are not handicapped because their diabetic condition and their poor eyesight "does not substantially limit major life activities." This argument is contrary to federal regulations, to case law,[93] to the City's own actions and admissions, and to common sense.

6. It is obvious that "securing, retaining, [and] advancing in employment" is a "major life activity." [94] Here, the City refused to permit insulin-controlled diabetics and persons with damage in one eye to hold "primary driving positions," *even though these employees could safely drive on City business.* The City simply cannot excuse its discrimination by asserting that "driving is not a major life activity"—or that the plaintiffs were not discharged, but were permitted to remain in lower-paid non-driving jobs with little or no hope for advancement.

7. Moreover, the City admitted that the plaintiffs were handicapped. After being given physicals by a City doctor, Chandler and Maddox were no longer permitted to drive—solely because of Chandler's diabetes and Maddox's damaged left eye. This discrimination cannot be excused by the City's *Catch-22* [95] argument: that the plaintiffs did not consider themselves to be handicapped because they could safely drive with diabetes and a damaged eye, so there was no handicap discrimination in the City's refusal

---

[93] Diabetes mellitus is clearly a handicap. *Serrapica v. City of New York*, 708 F.Supp. 64 (D.C. N.Y. 1989), aff'd 888 F.2d 126 (2nd Cir. 1989). So is poor eyesight or permanent damage to one eye. *OFCCP v. Norfolk & Western RR*, Case No. 90-OFC-1 (1991). See also *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989); *Doe v. Garrett*, 903 F.2d 1455 (11th Cir. 1990).

[94] 41 C.F.R. § 60-741.2. See *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

[95] Joseph Heller, *Catch 22* (Simon & Schuster 1961).

to permit the plaintiffs to drive because of Chandler's diabetes and Maddox's damaged left eye.[96]

the plaintiffs are "otherwise qualified"

8. In a handicap discrimination case, an employer who claims that an employee presents a safety risk must show (i) that there is a reasonable probability of future injury because of the handicap, and ii) that it made this determination on an individual basis, considering the employee's work history, medical history, and probability for potential injury.[97] Moreover, "some risks must be accepted as the price of effectuating the legislative objective of eliminating barriers to the handicapped." [98]

9. In this case, the City did not give any individual consideration—either to Chandler, to Maddox, or to the class members. Instead, through AD 3-3, the City simply barred *all* persons with dibetes mellitus requiring insulin for control and with visual deficiencies from employment in 4,000 "primary driving positions."

10. Chandler (an insulin-controlled diabetic) was qualified to drive for the City from November 1981 to January 1985, and he is now qualified to drive (after being granted a waiver for a "primary driving position" in January 1990). *Obviously, he was just as qualified to drive for the City from January 1985 through January 1990.*

11. Maddox (whose left eye is permanently damaged, but who has 20/10 vision with both eyes) was qualified to drive for the City from November 1982 to April 1985, and he is now qualified to drive (after his plant mechanic

---

[96] The City's reliance on *Collier v. City of Dallas*, No. 86-1010 (5th Cir. Aug. 19, 1986) is misplaced. Collier had 20/30 vision in his worst eye, so he was not barred from any job by AD 3-3.

[97] *Chiari*, 920 F.2d 311; *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985); *Strathie v. DOT*, 716 F.2d 227 (3rd Cir. 1983).

[98] *OFCCP v. Norfolk & Western RR*, 90-OFC-1 (1991).

job was reclassified as a "secondary driving position" in March 1990). *Obviously, he was just as qualified to drive for the City from April 1985 through March 1990.*

12. Members of the two subclasses will be qualified to drive for the City—despite their diabetes mellitus and despite their eyesight problems—only if they pass physical examinations which show that they can drive safely. Obviously, if any class members do pass these physicals, then they will be "otherwise qualified" to drive despite their handicaps.

the plaintiffs work in "programs or activities" that receive federal financial aid

13. The evidence established that the City and its departments—including the Water Department, where both Chandler and Maddox are employed—have received federal financial assistance since before December 20, 1983 (two years prior to the filing of this suit).[99]

14. The City argues that the specific area in which Chandler and Maddox worked—*water purification*[100]—did not receive federal funding and, therefore, was not a "program or activity" covered by the Rehabilitation Act. However, the City offers no explanation as to why it made specific representations to both Chandler and Maddox—at the time each was hired—that they were protected by the Rehabilitation Act and that the City would not discriminate against them or any employees because of their handicaps.[101]

---

[99] See City of Dallas Schedule of Grant Activities for the years 1984-1988 (*Pl. Ex. 13*); City of Dallas Grant and Trust Information from October 1, 1983 through September 30, 1990 (*Pl.Ex. 1*); and Department of Interior Federal Water Pollution Control Administration Office of Research and Development and City of Dallas Offer and Acceptance of Federal Grant for Research Development under 33 U.S.C. 466 (*Pl.Ex. 15*)

[100] See Findings 25, 68-69; Pl.Exh. 16, 23, 95.

[101] By this argument, the City apparently concedes that the other divisions of the Water Department which did receive federal funds are covered by the Rehabilitation Act.

15. In addison, the City's argument is contrary to 29 U.S.C.A. § 794(4), which defines the term "program or activity" to mean *all of the operations* of "a department, agency, special purpose district, or other instrumentality of a state or of a local government." This definition is contained in the Civil Rights Restoration Act of 1987, Public Law No. 100-259 (1988), which overruled *Grove City College v. Bell*, 465 U.S. 555 (1984), for these stated reasons:

> (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of . . . section 504 of the Rehabilitation Act of 1973 . . .; and
>
> (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad institution-wide application of those laws as previously administered.[102]

16. Finally, it is undisputed that the City has received federal financial assistance and that some of these federal funds have been used by the Water Department. The City's attempt to justify its discrimination against handicapped employees—by claiming that federal assistance was not received by one part of the Water Department (the purification division)—is as baseless as it is disappointing.

the plaintiffs were treated adversely because of their disabilities

17. From January 1985 through January 1990, Chandler was not permitted to drive for the City as an electrician. He is now qualified to drive only because

---

[102] The Civil Rights Restoration Act of 1987 is to be given retroactive effect. See *Ayes v. Allain*, 893 F.2d 732, 755 (5th Cir. 1990), superseded on other grounds by an *en banc* decision, 914 F.2d 676 (5th Cir. 1990); *Leake v. Long Island Jewish Medical Center*, 869 F.2d 130 (2d Cir. 1989); *Lussier v. Dugger*, 904 F.2d 661 (11th Cir. 1990); *U.S. v. Vanella*, 619 F.2d 384, 386 (5th Cir. 1980).

he obtained a waiver for a "primary driving position" and because his job was subsequently reclassified as a "secondary driving position." However, Chandler (i) lost promotions that he would have received but for AD 3-3, and (ii) he is blocked from promotion to any "primary driving position" unless he can obtain a waiver under AD 3-3.

18. From April 1985 through March 1990, Maddox was not permitted to drive for the City as a mechanic. He is now qualified to drive only because his job was reclassified as a "secondary driving position." However, Maddox (i) lost promotions that he would have received but for AD 3-3, and (ii) he is blocked from promotion to any "primary driving position" by AD 3-3.

19. Class members have been demoted or threatened with dismissal because of AD 3-3.[103] For example, both Homer Stephens and Nathaniel Richardson were demoted from "primary driving positions" because they were insulin-controlled diabetics.[104]

20. Finally, the City intentionally discriminated against Chandler, Maddox and other class members because of their physical disabilities: diabetes mellitus requiring insulin for control and visual deficiencies. AD 3-3 is discriminatory on its face because its stated purpose is to exclude the plaintiffs from 4,000 positions in 138 job classifications because of their disabilities.

B. *Texas Commission on Human Rights Act*

21. Section 5.01(1) of the Texas commission on Human Rights Act[105] provides that it "is an unlawful em-

---

[103] Pl. Exh. 10 (Class Certification Hearing). Chandler was threatened with dismissal. Pl. Exh. 72, 85. Maddox was told he might be terminated if there was no other job available for him that was not a "primary driving position." See Finding 74.

[104] Pl. Exh. 127, 128.

[105] Tex. Rev. Civ. Stat. art. 5521k.

ployment practice for an employer . . . to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, *disability,* religion, sex, national origin, or age."

22. Under section 2.01(4) of the Texas act, the definition of "disability"—"a mental or physical impairment that substantially limits at least one major life activity"—is, for purposes of this case, identical to the definition of "handicap" in the Rehabilitation Act.[106]

23. Accordingly, for the same reasons stated above concerning the City's violations of the Rehabilitation Act, this Court concludes that the City also discriminated against Chandler, Maddox, and the two subclasses because they were disabled, in violation of the Texas Commission on Human Rights Act.

C. *42 U.S.C. § 1983*

24. The City's driver safety program, AD 3-3, was admittedly the official policy and practice of the City after its implementation in 1978.

25. The plaintiffs obviously had a property and liberty interest in their positions as City employees under the City's personnel rules[107]—so they are protected by 42 U.S.C. § 1983.

26. The City violated Chandler's *free speech* rights by demoting Chandler and disciplining him on March 25, 1986, in retaliation for Chandler's complaints about the discrimination of AD 3-3 and in retaliation for the filing of this suit. The City also violated the *free speech rights* of both Chandler and Maddox by threatening to terminate them because of their opposition to AD 3-3 and their

---

[106] See, e.g., *Chevron Corp. v. Redmon,* 745 S.W.2d 314 (Tex. 1987).

[107] Pl. Exh. 10, 11. See Finding 19.

continued complaints about its discrimination to supervisors and to other employees.

27. The City violated Chandler's *due process* rights by denying him any opportunity to present evidence—during Chandler's appeal from the demotion—that he had been demoted because of his opposition to AD 3-3's discrimination against handicapped employees. This denial of Chandler's due process rights was distinct from the City's actual discrimination against Chandler because of his handicap.

28. The City also violated the *equal protection* rights of Chandler and Maddox because, under the evidence, there was no rational basis for the City to discriminate against them because of their handicaps. The alleged considerations of safety provide no excuse for the City's actions in permitting Chandler and Maddox to drive in their work, then denying them the right to drive (and blocking any promotions), but then again letting them drive again for the City under AD 3-3.

D. *Damages, Injunctive Relief & Attorneys Fees*

29. Under the Rehabilitation Act of 1973, the plaintiffs are entitled to equitable relief, including back pay and promotion,[108] as well as compensatory damages.[109]

30. In addition, the plaintiffs are entitled to equitable relief and compensatory damages for the City's violations of 42 U.S.C. § 1983. The Rehabilitation Act does not provide the exclusive remedy for handicap discrimination.[110] And, the plaintiff's *free speech, equal protection*

---

[108] *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Lengen v. Dept. of Transportation*, 903 F.2d 1464 (11th Cir. 1990).

[109] *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982); *Kling v. County of Los Angeles*, 769 F.2d 532, 534 (9th Cir.), rev'd on other grounds 474 U.S. 936 (1985). See also *Franklin v. Gwinett Public Schools*, —— U.S. ——, 117 L.Ed.2d 208 (1992).

[110] See, e.g., *Alexander v. Chicago Park District*, 773 F.2d 850 (7th Cir. 1985); *Stewart v. Suwoll*, 55 F.E.P. 422 (D.C. Or. 1991);

and *due process* claims are distinct from their handicap discrimination claims under the Rehabilitation Act.

31. Chandler is entitled to recover $179,220.91 for damages sustained through February 11, 1991, and additional damages from that date until he is promoted to the Maintenance Supervisor 13 position.[111]

32. Maddox is entitled to recover $77,841.96 for damages sustained through February 11, 1991, and additional damages from that date until he is promoted to the Plant Mechanic T-9 position.[112]

33. Chandler, Maddox and the two subclasses are entitled (i) to injunctive relief against the City because of the handicap discrimination of AD 3-3, (ii) to the damages stated above (¶¶ 31, 32), and (iii) to costs and reasonable attorneys fees—*as provided in the judgment entered by this Court on April 29, 1991.*

Conclusion

The City of Dallas tells each of its handicapped employees—just as it told Chandler, Maddox, and members of the two subclasses—that it will not discriminate against them because of their disabilities and that they are protected in their City employment by the Federal Rehabilitation Act of 1973.

Yet, the City's AD 3-3 driver safety program clearly discriminates against handicapped employees who can safely drive in their jobs despite having insulin-controlled diabetes (like Chandler) and despite having damage to one eye (like Maddox). Even worse, the City—*which permitted Chandler and Maddox to drive for years, and*

Pendleton v. Jefferson School District, 54 F.E.P. 1676 (S.D. Ohio 1990); *Rothschild v. Grottenthaler*, 716 F.Supp. 796, 801 (S.D.N.Y. 1989).

[111] See Findings 91-92.

[112] See Findings 93-94.

which now permits them to drive, with full knowledge of their disabilities—attempts to justify its blatant discrimination against Chandler and Maddox by arguing that: (i) they were not qualified to drive City vehicles during the period from 1985 to 1990 because of their disabilities; but that (ii) Chandler and Maddox were not protected during this 1985-1990 period by laws prohibiting handicap discrimination, because they were not *really* handicapped.

At the end of his testimony, Lyle Chandler said: "*What has occurred in this case is simply wrong.*" He was correct . . . *absolutely correct!*

SIGNED THIS 10th DAY OF September, 1992.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:85-CV-2580-R

LYLE S. CHANDLER and, ADOLPHUS A. MADDOX, on behalf of themselves and others similarly situated,
Plaintiffs

v.

CITY OF DALLAS, *et al.*,
Defendants.

ORDER REINSTATING JUDGMENT

[Filed Sept. 10, 1992]

Based upon the Findings of Fact and Conclusions of Law entered September 10, 1992, the Judgment of April 29, 1991—a copy of which is attached to this Order—is reinstated.

This Judgment covers only the damages sustained by the plaintiffs through February 11, 1991. The additional damages that are due to the plaintiffs after February 11, 1991 will be determined after any appeal or after this reinstated Judgment becomes final.

SIGNED THIS 10th DAY OF September, 1992.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-85-2580-R

LYLE S. CHANDLER, *et al.*,
Plaintiff,

vs.

THE CITY OF DALLAS,
Defendant.

JUDGMENT

[Filed Apr. 29, 1991]

On August 6, 1990, trial on the merits of this case began. On August 10, 1990, the evidence was concluded and the counsel presented final arguments. On August 10, 1990, the Court entered its findings of fact and conclusions of law in open court, and supplemented these findings and conclusions by Order dated April 30, 1991. Based on such findings and conclusions, the Court enters judgment in favor of plaintiffs and class members as follows:

1. Defendant City of Dallas has violated the Rehabilitation Act of 1973 as amended, 29 U.S.C. § 701 *et seq.*

2. The Defendant has violated the Texas Commission on Human Rights Act, Article 5221(k), Tex. Rev. Civ. Stat.

3. Defendant has violated the First and Fourteenth Amendments of United States Constitution, and 42 U.S.C. § 1983 by denying Plaintiffs and class members due process, equal protection and free speech.

4. The following class and subclasses are maintainable and certified pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), (c)(1), and (c)(3):

> All City of Dallas employees as of April 26, 1989, and all City of Dallas employees hired after April 26, 1989, who have failed or fail the driver's safety physical given pursuant to administrative directive 3-3 after December 19, 1983, because they:
>
> > (a) have an established medical, clinical history or medical diagnosis of diabetes mellitus, requiring insulin for control ("diabetes standard subclass"); or
> >
> > (b) lack visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green and amber ("vision standard subclass").

5. Plaintiff Lyle S. Chandler is the class representative for the diabetes standard subclass; Plaintiff Adolphus A. Maddox is the class representative for the vision standard subclass. Plaintiffs Chandler and Maddox have met the requirements of Federal Rule of Civil Procedure 23(a), (b)(2), and (c)(1), and (c)(3), with regard to the respective subclasses herein defined.

6. The class and subclasses have been discriminated against in violation of the Rehabilitation Act of 1973, the Texas Commission on Human Rights Act, the due Process and equal protection clauses of the Fourteenth Amendment, and 42 U.S.C. § 1983.

7. The class and subclasses are entitled to injunctive relief. Defendant is ordered to retroactively certify from April 24, 1989 that each class member may operate a vehicle for the City of Dallas unless the class member's diabetes mellitus requiring insulin for control or visual impairments actually interfered or interferes with his/her ability to control and drive a motor vehicle safely for all periods from April 24, 1989.

8. Defendant shall not remove a class member from driving status or otherwise take adverse action against a class member solely because he has a medical diagnosis of diabetes mellitus requiring insulin for control or visual impairments and shall return to full driving status each class member unless there is an actual showing by the City that such diabetes mellitus or visual impairments interfere with the class member's ability to control and drive a motor vehicle safely.

9. The City of Dallas has discriminated against Plaintiff Lyle S. Chandler in violation of the Rehabilitation Act of 1973 as amended 29 U.S.C. § 701 *et. seq.*, the free speech, equal protection, and due process clauses of the First and Fourteenth Amendments of the United States Constitution, 42 U.S.C. § 1983, and Texas Commission on Human Rights Act, 5221(k) Tex. Rev. Civ. Stat. by its restrictions of Chandler from driving in his positions of T-9 Electrical Repairer and T-7 Electrical Repairer, its failure to promote him to the position of T-10 Electrical Repair Supervisor on January 22, 1985, and failure to promote him to the position of 13 Water Maintenance Supervisor on May 31, 1989 because of his handicap and because of his opposition to Defendant's discrimination based on handicap. The Court also finds that the City has discriminated and retaliated against Lyle S. Chandler by its demotion of him to the position of T-7 Electrical Repairer on March 25, 1986. Plaintiff Lyle S. Chandler is due declaratory and injunctive relief in the form of retroactive placement in the position of T-10 Electrical Repair Supervisor as of January 22, 1985; retroactive re-

peal of his demotion to the position of T-7 Electrical Repairer; and retroactive promotion to the position of Water Maintenance Supervisor 13 as of May 31, 1989. He is further due from the Defendant back pay including benefits and interest in the sum of $79,220.91 to February 11, 1991, together with interest at the rate of 6.26% per annum. In addition, Defendant shall pay Lyle S. Chandler from February 11, 1991, at the rate of a 13 step 7 Water Maintenance Supervisor. Plaintiff Lyle S. Chandler is further due from the City of Dallas damages for past and future mental suffering and anguish, past and future physical pain and suffering, past and future humiliation, past and future harm to his reputation in the total sum of $100,000 plus interest at the rate of 6.26% per annum.

10. Defendant discriminated Plaintiff Adolphus Maddox in violation of the Rehabilitation Act of 1973 as amended, the free speech, due process and equal protection clauses of the First and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. § 1983, and the Texas Commission on Human Rights Act, 5221(k), Tex. Rev. Civ. Stat., because of the Defendant's threatened discipline, actual removal from driving duties and denial of promotion to Defendant Adolphus Maddox because of his visual handicaps and opposition to Defendants discrimination based on him because of his handicap. Specifically, the Court finds and Orders that Defendant retroactively promote Adolphus Maddox to the position of T-9 Plant Mechanic as of May 3, 1985. Defendant shall pay Adolphus Maddox $27,841.96 for lost back pay and benefits including retirement contributions plus interest from August 1, 1990 at the rate of 6.26% per annum, and shall restore to Plaintiff Adolphus A. Maddox's accrued vacation account one hundred twenty-five (125) hours of vacation time charged against him by Defendant in regard to Maddox's necessary participation in this case. In addition, Defendant shall pay the Plaintiff Adolphus Maddox interest on lost back pay and benefits from May

13, 1985, and shall pay Adolphus Maddox from February 1, 1991, at the rate of T-9 step 6 Plant Mechanic. Plaintiff Adolphus Maddox is further due from the City of Dallas damages for the past and future mental suffering and anguish, past and future physical pain and suffering, past and future humiliation, past and future harm to his reputation in the total sum of $25,000 together with interest at the rate of 6.26% per annum.

11. Defendant shall remove from all of its files and records any and all documents containing or referring to Lyle Chandler's demotion and/or Plaintiffs' claims and actions regarding Administrative Directive 3-3 and/or this lawsuit.

12. Plaintiffs and their attorneys are due from the City of Dallas reasonable attorneys' fees and reimbursement of reasonable expenses associated with this litigation under the Rehabilitation Act, the Texas Commission on Human Rights Act and 42 U.S.C. § 1988. Plaintiffs are directed to file requests for such fees and costs with supporting affidavits on or before May 17, 1991. Finally,

13. Plaintiffs are allowed all writs and processes necessary to enforce the relief granted herein.

SIGNED AND ENTERED this 29th day of April, 1991.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-1580

LYLE S. CHANDLER and ADOLPHUS A. MADDOX,
on behalf of themselves and others similarly situated,
Plaintiffs-Appellees,

v.

THE CITY OF DALLAS, *et al.*,
Defendants,

THE CITY OF DALLAS,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

April 9, 1992

Frank J. Garza, Asst. County Atty., Sam A. Lindsay, First Asst. County Atty., Dallas, Tex., for City of Dallas.

Genice A. Rabe, Millinax, Wells, Baab & Cloutman, Irving, Tex., for plaintiffs-appellees.

Before GOLDBERG, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM.

Although the multiple causes of action brought by the Appellees involved the driver safety program instituted by the City of Dallas in 1978, on appeal this case is about Federal Rule of Civil Procedure 52(a).

I.

Through Administrative Directive 3-3, the City of Dallas ("City") instituted a driver safety program in 1978.[1] The driver safety program basically disqualified any City employee with one of the specified health conditions from certification as a primary driver.[2] Without certification as a primary driver, an employee was ineligible for any City job classified as a "primary driver position." A job classified as a primary driver position involved driving as an integral part of carrying out the duties of the job. Two physical conditions precluded employees from certification as primary drivers eligible for primary driving positions: 1) diabetes mellitus that required insulin for control; and, 2) poor eyesight—distant visual acuity uncorrectably worse than 20/40 Snellen in each eye or worse than 20/40 Snellen in both eyes, a field of vision of less than 70 degrees in the horizontal meridian in each eye, or the inability to recognize the colors of standard traffic signals.

In 1977, Lyle Chandler was diagnosed as having diabetes mellitus severe enough to require insulin for control. The Dallas Water Utilities division of the City of

---

[1] We have gleaned this factual framework primarily from the district court's judgment entered April 29, 1991 and memorandum opinion and order entered November 4, 1986 denying the City's motion to dismiss for failure to state a claim and denying in part and granting in part the City's motion for summary judgment.

[2] AD3-3 has been amended numerous times since its adoption. After the Plaintiffs filed this lawsuit, the City changed AD3-3 to allow employees with specified conditions (other than substandard vision, alcoholism or drug use) to obtain a waiver that allows their certification as primary drivers.

Dallas ("DWU") hired Chandler in 1981 as a T-9 Electrical Repairer. The City classified the T-9 as a primary driving position in 1984. In 1985, however, Chandler failed a driver's physical administered by the City's doctor, although he had driven in the position for about three years. Presumably because Chandler could not qualify as a primary driver, DWU would not allow him to take a promotional exam for the position of Electrical Repair Supervisor T-10. Chandler continued as a T-9, with other employees driving him as demanded by his job duties. DWU demoted Chandler to Electrical Repair T-7 in 1986. DWU traces the demotion to Chandler's violations of City personnel and safety rules. Chandler was later denied the opportunity for promotion to the position of Water Maintenance Supervisor 13. Chandler contends that the City's failures to promote him and its demotion of him constituted discrimination based on his physical impairment and retaliation for his opposition to the AD 3-3 driver safety plan.

Since childhood, Adolphus Maddox has had visual acuity uncorrectably worse than 20/40 in his left eye. DWU hired Maddox in 1982 and, from 1983 through early 1985, employed him as a Plant Mechanic T-7. The City classified the T-7 as a primary driving position in 1984. In 1985, Maddox, like Chandler, failed a driver's physical, although he had driven for two years in the T-7 position. Maddox continued as a T-7, with other employees driving him when needed. Presumably because Maddox could not qualify as a primary driver, he has not been eligible for a promotion to Plant Mechanic T-9. Maddox argues that the City discriminated against him based on his physical impairment and retaliated against him for his opposition to the City's driver safety program.

In late 1985, Chandler and Maddox sued the City of Dallas on behalf of themselves and all others adversely affected by the AD3-3 driver safety program ("Plaintiffs") under the Rehabilitation Act of 1973, the Revenue Sharing Act of 1982, the Texas Commission on Human

Rights Act, the 14th Amendment and 42 U.S.C. § 1983. Plaintiffs claimed that the AD3-3 discriminated against employees with diabetes requiring insulin and visual deficiencies by barring them from jobs designated as primary driving jobs, and, further, that the City retaliated against them for their opposition to the driver safety plan. The district court denied the City's motion to dismiss, and denied the City's motion for summary judgment, except with respect to claims barred by the statute of limitations. The district court certified a class of City employees who failed the driver's physical and defined two narrow subclasses of persons with the same medical conditions as Chandler and Maddox for injunctive relief.

After a bench trial, the court entered judgment for the Plaintiffs, holding that the City discriminated against them in violation of the Rehabilitation Act, the Texas Commission on Human Rights Act, the free speech clause of the first amendment (as to Chandler and Maddox only), the due process and equal protection clauses of the fourteenth amendment, and § 1983. The court awarded Chandler retroactive repeal of his demotion, and awarded Chandler and Maddox retroactive promotions, lost back pay and benefits (including interest), and compensatory damages. The court awarded the class injunctive relief requiring the City to: 1) retroactively certify all class members as primary drivers unless their medical conditions actually interfered with their driving abilities; and, 2) abstain from discriminating against any class member unless the City showed that the employee's medical condition interfered with the employee's ability to drive safely. The Plaintiffs were awarded reasonable attorney's fees and costs of litigation.

The City presents six issues on appeal: 1) Whether the district court failed to make specific findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a); 2) Whether the City's driver safety program violated the Rehabilitation Act; 3) Whether the City's driver safety program violated the

Texas Commission on Human Rights Act; 4) Whether the City's driver safety program violated the Plaintiffs' free speech, equal protection, and due process rights; 5) Whether the district court properly certified the class under Federal Rules of Civil Procedure 23; and, 6) Assuming the district court properly resolved the liability issues, whether the Plaintiffs were entitled to remedies under § 1983 on their first amendment, due process and equal protection claims.

II.

Federal Rule of Civil Procedure 52(a) provides that "[i]n all actions tried upon the facts without a jury . . ., the court shall find the facts specially and state separately its conclusions of law thereon." On August 10, 1990, at the end of a five-day trial, the district court verbally announced certain findings of fact and conclusions of law. The court stated that it

> had hoped at this point to be able to state [its] findings of fact and conclusions of law, and [it] simply d[id] not have enough time to go through all the evidence and make the notes that [it] needed to do that. . . . [The court] hoped to be able to do that before the end of the month. All that will take place at that hearing w[ould] be [the] dictating of [the court's] findings and conclusions. . . . but [the court would] tell [the parties] what [it was] going to find today.[3]

On April 29, 1991, the court entered an order declaring that supplementation of the findings and conclusions announced in court was unnecessary because they "ade-

---

[3] We gained access to this statement through the City's Record Excerpts. We note, however, that the district court's verbal announcements following closing argument at trial have not been included in the record on appeal. Neither the City nor the Appellees has moved to supplement the record with these final pages of the trial transcript.

quately state[d] the factual and legal basis" for the court's decision. So, based on the verbal findings and conclusions, the court entered judgment in favor of the Plaintiffs. In its order, however, the court invited the parties to submit additional proposed findings and conclusions. The Plaintiffs later filed forty-eight pages of proposed amended and additional findings of fact and conclusions of law. The docket sheet reflects that the City did not respond, nor did the court act on the proposed findings and conclusions.

The City argues that the findings of fact and conclusions of law are not sufficiently detailed to adequately state the factual or legal basis for the district court's decision. This deficiency, according to the City, is not a mere technicality—it prevents effective review because this Court cannot understand the issues on appeal. The City urges this Court to vacate the judgment and remand for proper findings and conclusions.

Plaintiffs contend that the district court's findings of fact and conclusions of law satisfy the requirements of Rule 52(a). Plaintiffs argue that this Court can engage in "meaningful appellate review" based on multiple rulings made by the district court, colloquies with counsel at the class certification hearing and trial, and oral findings of fact and conclusions of law issued at the class certification hearing and the bench trial. Plaintiffs essentially maintain that the *totality* of findings and conclusions throughout the protracted, five-year course of this litigation meets the underlying requirement of Rule 52(a): providing the appellate court with a full understanding of the issues.

The requirement found in Federal Rule of Civil Procedure 52(a) that courts "shall find the facts specially" exists to serve several aims: 1) aiding the trial court's adjudication process by engendering care by the court in determining the facts; 2) promoting the operation of the doctrines of res judicata and estoppel by judgment; and, 3) providing findings explicit enough to enable appellate

courts to carry out a meaningful review. *Texas Extrusion Corp. v. Palmer, Palmer & Coffee (In re Texas Extrusion Corp.)*, 836 F.2d 217, 220 (5th Cir.) (citing *Ramirez v. Hofheinz*, 619 F.2d 442, 445 (5th Cir.1980) (citations omitted)), order *aff'd*, 844 F.2d 1142, *cert. denied*, 488 U.S. 926, 109 S.Ct. 311, 102 L.Ed.2d 330 (1988); *Lopez v. Current Director of Tex. Economic Dev. Comm'n*, 807 F.2d 430, 434 (5th Cir.1987) (citing *Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394, 400 (5th Cir.1986) (footnotes omitted)); *see also* Fed. R. Civ.P. 52(a) advisory committee's note. Fifth Circuit cases interpreting the rule have long recognized that "failure to meet the technical requirements of Rule 52 does not warrant reversal or remand"—"so long as the purposes behind the rule are effectuated." *Ramirez*, 619 F.2d at 445 (citations omitted). The rule " 'exacts neither punctilious detail nor slavish tracing of the claims issue by issue and witness by witness.' " *Collins v. Baptist Memorial Geriatric Center*, 937 F.2d 190, 195 (5th Cir.1991) (quoting *Lopez*, 807 F.2d at 434 (quoting *Ratliff*, 791 F.2d at 400) (footnote omitted)), *cert. denied*, —— U.S. ——, 112 S.Ct. 968, 117 L.Ed.2d 133 (1992). Moreover, nothing in the rule precludes verbal announcement of findings of fact and conclusions of law. Rule 52(a) expressly permits the district court to orally proclaim its findings and conclusions in open court.[4]

Under the rule, of course, we subject the district court's findings of fact to a deferential standard of review—we will not "set aside [findings of fact] unless clearly erroneous." Fed.R.Civ.P. 52(a). This translates into a need for findings, however, that " 'provide a sufficiently definite predicate for proper appellate review.' " *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201,

---

[4] "It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court." Fed.R.Civ.P. 52(a).

1203 (5th Cir. 1989) (citations omitted). Indeed, "when the trial court's decision turns in part upon factual determinations," findings of fact are crucial to a court of appeals engaging in the process of review. *Texas Extrusion*, 836 F.2d at 220. A prior opinion of this Court eloquently cauptures our view of the interplay between the roles of the district and appellate courts:

> Fact finding is the trial court's province. . . . We do remain responsible, however, for the ultimate justness of trial determinations drawn before us. Since this is so, we must know the basis of the trial court's decisions: 'this Court cannot be left to second-guess the factual basis for the district court's conclusion.' . . . Review *is* our responsibility, and we cannot review bare conclusions. . . . In short, our duty to respect the trial court's factual determinations gives rise to a reciprocal one on its part to tell us the reasons for them. . . . [A] mere statement of result—cannot stand.

Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731, 734-35 (5th Cir.1986) (emphasis in original) (citations omitted). Quite simply, a district court's failure to detail its findings or the evidentiary basis for its findings "negates our ability to apply the clearly erroneous standard of review." *Lopez*, 807 F.2d at 434.

Rule 52(a) also obligates the district court to "state separately" its conclusions of law. We do not minimize the district court's task of detailing its conclusions of law. Courts of appeal subject a district court's conclusions of law to a *de novo* review—we are not constrained by the deferential standard of reviewing only for clear error. Despite this distinction, the duty of the district court to "state separately its conclusions of law thereon" becomes particularly important when the case, like this one, involves complex legal issues. For when the district court carefully enunciates and explains its resolution of questions of law, we know that it has thoughtfully and dili-

gently decided the legal issues. Moreover, the preparation of sufficiently complete conclusions of law augments our comprehension of the legal issues on appeal. We must understand not only the factual, but also the legal reasoning of the district court to enable us to conduct a "just, orderly review of the rights of the parties before us." *Browning v. Kramer,* 931 F.2d 340, 344 (5th Cir.1991).

The touchstone of our Rule 52(a) analysis has remained the same over the years: Whether we, as an appellate court, can obtain a "full understanding of the issues on appeal." *Texas Extrusion,* 836 F.2d at 221 (citations omitted). Here, the district court did not completely fail to make findings of fact or conclusions of law. We do detect, however, an insufficiency "in detail and exactness" to demonstrate the factual and legal basis "for the ultimate conclusion[s] reached by the court." *See Acme Boat Rentals, Inc. v. J. Ray McDermott & Co.,* 407 F.2d 1324, 1325 (5th Cir. 1969). The district court did not make findings on each issue of fact, nor did it disclose the factual basis for the findings verbally stated at the end of trial [5] or reveal its determination of each issue of law. The court did not—at any point—*articulate* its resolution of many of the factual and legal issues necessary to support the judgment for Chandler, Maddox, and the certified class on their numerous causes of action. For example, the portion of the judgment rendering the City liable on the Plaintiffs' Rehabilitation Act claim alone required multiple findings of fact: Whether the Plaintiffs were "handicapped" within the meaning of the Rehabilitation Act; whether the Plaintiffs were "otherwise qualified" for their jobs at DWU; whether the Plaintiffs worked for a "program or activity" that received "federal financial assistance"; and whether the Plaintiffs were discrim-

[5] If we accepted Plaintiffs' invitation to locate factual findings in the district court's *pre-trial* rulings and colloquies with counsel, the need for a trial would disappear because the district court would have essentially decided the case before trial.

inated against solely because of their handicaps. Without findings on these and other issues of fact, we cannot obtain a complete understanding of the issues on appeal and shoulder our responsibility to review for clear error. *Cf. W.F. Dev. Corp. v. Office of U.S. Trustee (In re W.F. Dev. Corp.)*, 905 F.2d 883 (5th Cir.1990) (professing a "full understanding of the issues on appeal even absent findings of fact" only because the "case [wa]s not fact specific"), *cert. denied*, —— U.S. ——, 111 S.Ct. 1311, 113 L.Ed.2d 245 (1991). In terms of conclusions of law, for instance, we cannot determine the district court's reasons for deciding, as a threshold legal issue in its First Amendment analysis, that Chandler and Maddox proved that their speech involved matters of public concern. For these reasons, we hold that the district court did not satisfy the requirements of rule 52(a).

We do observe, however, that the district court patiently heard all of the evidence, allowed the parties to present their cases in full, and sought to resolve the case in a responsible manner. The record in this case is massive and the issues complicated, which makes the task of articulating the findings of fact and conclusions of law quite burdensome. But that is exactly why we need detailed findings of fact and thorough conclusions of law.

Our resolution of this threshold issue flows from our inability to ascertain the factual and legal bases for the district court's decision. This inability prevents our review of the remaining issues raised by the City in this appeal. Our precedents teach that we must, therefore, vacate the judgment of the district court and remand for the district court to fully articulate its findings of fact and conclusions of law. *See Utley v. Commissioner of Internal Revenue*, 906 F.2d 1033, 1041 (5th Cir.1990) (quoting *Texas Extrusion*, 836 F.2d at 221); *Cities Serv. Co. v. Ocean Drilling and Exploration Co. (In re Incident Aboard the D/B Ocean King)*, 758 F.2d 1063, 1072 (5th Cir.1985) (citations omitted).

III.

The findings of fact and conclusions of law play a duet; the district court tunes one to the other. Under Federal Rule of Civil Procedure 52(a), the district court must record appropriate portions of the musical selection for us to hear on appeal. When we hear a blank tape, however, we cannot evaluate the tenor of the melody.

We are thus compelled to VACATE the judgment of the district court and REMAND the case for detailed findings of fact and concomitant conclusions of law consistent with this opinion.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:85-CV-2580-R

LYLE S. CHANDLER and, ADOLPHUS A. MADDOX,
on behalf of themselves and others similarly situated,
Plaintiffs

v.

CITY OF DALLAS, *et al.*,
Defendants.

ORDER DENYING STAY OF JUDGMENT

[Filed Sep. 10, 1992]

The defendant's Motion for Stay of the judgment pending appeal (filed May 13, 1991) will be treated as a motion to stay the Reinstated Judgment (entered September 10, 1992). That motion to stay is DENIED for the following reasons:

1. The City is not entitled to any stay of a federal judgment on the basis of a state law, § 6.002 of Tex.Civ. Prac. & Rem. Code Ann. Instead, the City is entitled to a stay of the backpay and damage award only by posting a supersedeas bond under Rule 62, Fed.R.Civ.P.

2. The City is not entitled to stay any of the injunctive relief awarded by the judgment because:

(i) the City is not likely to succeed on the merits of any appeal;

(ii) the City will not suffer irreparable injury if the injunctive relief is not stayed;

(iii) a stay would cause substantial harm to the individual plaintiffs and to the two subclasses; and

(iv) the injunctive relief granted in the judgment is, most definitely, in the public interest.

See *Hilton v. Brownskill*, 481 U.S. 770 (1987); *Coastal States Gas Corp. v. Department of Energy*, 609 F.2d 736 (5th Cir. 1979).

3. The history of this case—specifically, the delay in the final resolution of this matter, as detailed in this Court's Findings of Fact and Conclusions of Law (entered September 10, 1992)—also weighs heavily against any stay of the Reinstated Judgment.

SIGNED this 10th day of September, 1992.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1849

LYLE S. CHANDLER and ADOLPHUS A. MADDOX,
on behalf of themselves and others similarly situated,
Plaintiffs-Appellees,

versus

THE CITY OF DALLAS, *et al.*,
Defendants,

THE CITY OF DALLAS,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

[Filed Jul. 16, 1993]

Before DUHÉ, and WIENER, Circuit Judges.*

BY THE COURT:

IT IS ORDERED that the motion of appellant to stay injunctive relief pending judgment on appeal and motion to stay discovery is GRANTED.

---

* This matter is being decided by a quorum, 28 U.S.C. 46(d).

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-85-2580-R

LYLE S. CHANDLER, *et al.*,
Plaintiffs,

v.

CITY OF DALLAS,
Defendant.

MEMORANDUM OPINION AND ORDER

[Filed Nov. 4, 1986]

Defendant moves to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(6), or alternatively seeks summary judgment pursuant to Fed. R. Civ. P. 56(b). This Court grants in part and denies in part.

Facts

The City of Dallas Water Utilities Division ("DWU"), pursuant to Administrative Directive 3-3 ("AD3-3"), requires all employees in positions designated as "primary drivers" to meet certain physical requirements. Under certain circumstances these requirements may be waived; waivers, may not be obtained, however, by employees suffering from diabetes requiring insulin for control and visual acuity.

In 1977, Plaintiff Lyle Chandler was diagnosed as having diabetes mellitus requiring insulin for control. On

November 30, 1981 Chandler was hired by DWU as a T-9 Electrical Repairer. From November 30, 1981 until January 25, 1985, he was allowed to drive in this position. Plaintiff Adolphus Maddox has had visual acuity of less than 20/40 in his left eye since childhood. On November 29, 1982 Maddox was hired by the DWU as a Laborer 56. From July 20, 1983 to April 24, 1985, Maddox was allowed to drive in his position of Plant Mechanic T-7.

In 1984 DWU determined that the positions held by Chandler and Maddox should be held by primary drivers. Thereafter, both plaintiffs were reassigned to different positions within the DWU. Chandler was denied the opportunity to take the promotional exam to Electrical Repair Supervisor T-10, and Maddox was denied the opportunity for promotion to T-9 Plant Mechanic—presumable because they did not qualify as "primary drivers" under AD3-3.

On December 20, 1985 Plaintiffs filed suit on behalf of themselves and all others similarly situated against the City of Dallas under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796 (1986), in particular 29 U.S.C. §§ 794, 794a; the Revenue Sharing Act of 1982, 31 U.S.C. §§ 6701-6724 (1982 & Supp. 1986); the fourteenth amendment of the United States Constitution; and 42 U.S.C. § 1983 (1981). This action is also filed under the Texas Commission on Human Rights Act, Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon Supp. 1986). Plaintiffs claim that AD3-3 is a discriminatory term and condition of their employment.

The Defendant moves to dismiss, or alternatively to seek summary judgment, on the following grounds:

1. That the City of Dallas Water Utilities Department does not receive Federal financial assistance within the meaning of section 504 the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1985).

2. That plaintiffs are not otherwise handicapped individuals within the meaning of section 504 of the Rehabilitation Act of 1973.

3. That the statute of limitations bars all claims of named Plaintiffs arising before December 20, 1983.

4. That Plaintiffs must exhaust administrative remedies before asserting a claim under the Rehabilitation Act of 1973.

5. That the named Plaintiffs' constitutional claims discrimination are barred because section 504 is the exclusive remedy.

6. That Plaintiffs' pendent state claims should be dismissed.

The "motion to dismiss" is, obviously, an improper motion under Fed. R. Civ. P. 12(b)(6), because it relies upon matters outside of the pleadings. Therefore, the motion to *dismiss* is DENIED, and this opinion will deal with the alternative motion for summary judgment.

Analysis

1. Section 504 of the Rehabilitation Act states in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794 (1985).

In *Brown v. Sibley*, the Fifth Circuit held that "it is not sufficient, for purposes of bringing a discrimination claim under section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has

received some form of input from the federal fisc. A private plaintiff in a section 504 case must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance." *Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981) (footnotes omitted). Section 504 is applied to entities receiving federal financial assistance in a fashion that is described as "program-specific." *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 636 (1984). This program-specifity does not, however, limit section 504's application to federally funded prorgrams whose "primary objective" is employment, *id.*, at 635, yet the precise scope of program specificty has not been determined, *United States Department of Transportation v. Paralyzed Veterans of America*, 54 U.S.L.W. 4854, 4859 (U.S. June 27, 1986) (Marshall, J. dissenting) ("[t]he majority never explains the scope of the 'program or activity receiving Federal financial assistance or . . . conducted by any Executive agency)"; *see Consolidated Rail Corp. v. Darrone*, 456 U.S. at 635-36; *see also North Haven Board of Education v. Bell*, 456 U.S. 512, 540 (1982) (declining to define "program" within the meaning of Title IX).

Defendant, City of Dallas, admits that it is the recipient of federal assistant in the form of EPA funds. In addition it admits that DWU, the department in which the plaintiffs worked, is also the recipient of federal funds. Nevertheless, it argues that the DWU is strictly divided into distinct entities for budget purposes and the particular programs or activities to which the plaintiffs were assigned were not the direct recipient of federal assistance. Defendant urges the court to make the distinction between the waste water and purification divisions of the DWU, alleging that federal funds were received only by the waste water division and not the purification divisions. Through the affidavit of Jane Burazer, Defendant contends that the plaintiffs have worked exclusively in the purification division of DWU. Plaintiffs, on the other

hand, have submitted affidavits attesting that they have worked in the research and development division which services all divisions of DWU.

Even if this court were to agree with the Defendant and find that "program" within the meaning of section 504 requires a distinction between the waste water and purification divisions of DWU, material issues of fact still exist with respect to the employment assignments of Chandler and Maddox. Therefore the Defendant's motion in this respect must be denied.

2. Section 706(7) defines handicapped individual to mean:

> "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

29 U.S.C. § 706(7)(B).

"All three alternatives rely on the construction of the phrase 'substantially limits one or more of such person's major life activities.'" *Collier v. City of Dallas*, No. CA-3-84-1808-H, slip op. at 3 (Dec. 2, 1985), *aff'd*, No. 86-1010, slip op. (5th Cir. Aug. 19, 1986). Under the current summary judgment record, there are genuinie issues of material facts concerning whether the inability to drive a City vehicle because of impaired vision or diabetes amounts to a substantial limit on plaintiffs' major life activities, or whether the City regarded the plaintiffs as having such an impairment. See *id.*, at 3.

In addition, fact questions exist as to whether or not each of the plaintiffs is "otherwise qualified" for the position of primary drivers. Other qualifications which a handicapped person may be required to meet include necessary physical qualifications. *Southeastern Community College v. Davis*, 442 U.S. 397, 407-08 (1979). This is particularly so since each of the plaintiffs actually was

permitted to drive in his respective position before disqualification under AD3-3—and since, unlike *Collier*, the summary judgment record does not establish that the jobs in question involved substantial driving. Finally, fact questions exist concerning whether the plaintiffs may be excluded from driving positions because they do not meet the standards of AD3-3.

Therefore, the Defendant's motion for summary judgment is DENIED.

3. Defendant also moves for summary judgment with respect to all claims of named plaintiffs that allegedly arise before December 30, 1983. Its motion must be GRANTED in this respect.

Section 504 contains no statute of limitations of its own. Therefore, the court must look to state law to determine the appropriate limitations period. Actions under § 1983 and the Rehabilitation Act are best characterized as personal injury actions for purposes of determining the applicable limitations period. *Wilson v. Garcia*, 53 U.S.L.W. 4481 (U.S. April 17, 1985). Under Texas law, the applicable statute of limitations for personal injury is two years. Tex. Civ. Prac. & Remedies Ann. § 16.003 (1986). Plaintiffs filed suit on December 20, 1985, thus the statute of limitations bars all claims prior to December 20, 1983.

4. Defendant also seeks summary judgment contending that Plaintiffs must exhaust their administrative remedies before asserting a claim under the Rehabilitation Act. In *Smith v. United States Postal Service*, the 6th Circuit held that federal employees who had "extensive administrative procedures to remedy the alleged wrong," 742 F.2d 257, 262 (6th Cir. 1984), are required to exhaust those procedures before filing a claim in federal court. However, "where meaningful administrative remedies do not exist for the individual complainant exhausion is not required." *Association for Retarded Citizens in Colorado v. Frazier*, 517 F. Supp. 105, 123 (D. Colo. 1981).

AD3-3 denies waivers to persons suffering from visual impairments or diabetes. As a result there is no procedure available to employees with these impairments. Thus, unlike the federal employees in *Smith*, plaintiffs have no known administrative remedies available to them and exhaustion is not required. Defendant's motion is therefore DENIED.

5. Finally, Defendant asks the court for summary judgment on the plaintiffs' constitutional claims alleging that the Rehabilitation Act is the exclusive remedy to aggrieved persons under the law. Its motion is DENIED.

Defendant urges this court to accept the "strong authority" of *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1981). This authority cannot be accepted; neither the court of appeals nor the Supreme Court addressed the issue of exclusivity. *Id.*, at 1162-63; *Southeastern Community College v. Davis*, 442 U.S. at 404-05 n.5. The defendant's motion must be DENIED.

6. In light of the foregoing, Defendant's motion to dismiss the pendent state claims is denied. *United Mine Workers v. Gibb*, 383 U.S. 715 (1966).

SIGNED this 4th day of November, 1986.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-85-2580-R

LYLE S. CHANDLER, *et al.*,
Plaintiffs,

vs.

THE CITY OF DALLAS, *et al.*,
Defendants.

ORDER OF CLASS CERTIFICATION

[Filed Apr. 26, 1989]

Came on for consideration Plaintiffs' Motion for Class Certification and after a Class Certification Hearing held on March 22, 1989, and March 23, 1989, at which oral and documentary evidence was presented by Plaintiffs and Defendant the City of Dallas, and after review of such evidence and argument of counsel, the Court orally made Findings of Fact and Conclusions of Law on March 23, 1989, which are incorporated herein as if fully set forth. In accord with such Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. Plaintiffs' Motion for Class Certification is granted in part and denied in part.

2. The class and subclasses maintainable and certified pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), (c)(1), and (c)(3), are all present City of Dallas employees and all City of Dallas employees hired after the date of this order, who have failed or fail the driver's safety physical given pursuant to Administrative Directive 3-3 after December 19, 1983, because they:

(a) have an established medical clinical history or medical diagnosis of diabetes mellitus requiring insulin for control ("diabetes standard subclass"); or

(b) lack distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses and visual acuity separately corrected to 20/40 (Snellen) or better; distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses; field of vision of at least 70 degrees in the horizontal meridian in each eye; or the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber ("vision standard subclass").

3. Plaintiff Lyle S. Chandler is the class representative for the diabetes standard subclass; Plaintiff Adolphus A. Maddox is the class representative for the vision standard subclass. Plaintiffs Chandler and Maddox have met the requirements of Federal Rule of Civil Procedure 23(a), (b)(2), and (c)(1) and (3), with regard to the respective subclasses herein defined.

4. The class and subclasses are maintainable and certified for purposes of injunctive relief only. This Order does not affect existing or potential damage claims, if any, of any member of the certified class and subclasses pursued outside this action.

5. This Order does not affect the individual claims of Plaintiffs Lyle S. Chandler and Adolphus Maddox relating to liability and damages, if any, and such individual claims will be tried in conjunction with the claims of the certified class and subclasses for injunctive relief.

So ORDERED this 26th day of April, 1989.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1849

LYLE S. CHANDLER and ADOLPHUS A. MADDOX,
on behalf of themselves and others similarly situated,
Plaintiffs-Appellees,

versus

THE CITY OF DALLAS, *et al.*,
Defendants,

THE CITY OF DALLAS,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(November 2, 1993)

Before SMITH, DUHÉ and WIENER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. V. Wiener, Jr.
J. V. WIENER, JR.
United States Circuit Judge

APPENDIX K

EXCERPTS FROM FEDERAL REGULATIONS CONCERNING THE REHABILITATION ACT

The Department of Health and Human Services has defined "Handicapped persons, "Physical or mental impairment," "major life activities," "[h]as a record of such an impairment," and "[i]s regarded as having an impairment" under regulations pertaining to the Rehabilitation Act as follows:

§ 84.3 Definitions.

As used in this part, the term

(j) *Handicapped person.* (1) *Handicapped persons* means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) *Physical or mental impairment means* (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

45 C.F.R. § 84.3(j) (1992). The Department of Labor, the Environmental Protection Agency, and the Department of Justice have applied substantially the same definition for these terms. 40 C.F.R. § 7.25(1993), 29 C.F.R. § 32.3(1993); 28 C.F.R. § 42.540(k) (1993).

The same regulations provide that with regard to employment discrimination the prohibitions apply to:

Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from lay off and rehire; [and]

Rates of pay or any other form of compensation and changes in compensation.

45 C.F.R. § 84.11(b)(2) and (3)(1993); 40 C.F.R. § 7.60(c)(2) and (3)(1993); 29 C.F.R. § 32.12(b)(2) and (3)(1993); 28 C.F.R. § 42.50(b)(2) and (3) (1993).

The Office of Federal Contract Compliance Programs defines handicapped individual under the Rehabilitation Act as follows:

Handicapped individual means any person who (1) has a physical or mental impairment which

> substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. For purposes of this part, a handicapped individual is "substantially limited" if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap.

41 C.F.R. § 60.741.2 (1993).

APPENDIX L

EEOC REGULATIONS CONCERNING THE AMERICANS WITH DISABILITIES ACT

Relevant portions of the Equal Employment Opportunity Commission's Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630 are:

§ 1630.2 Definitions.

(g) *Disability* means, with respect to an individual—

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) being regarded as having such an impairment.

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act provides in relevant part:

Section 1630.2(h). Physical or Mental Impairment

. . .

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the *disorder* were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

. . .

Section 1630.2(j) Substantially Limits

. . . [A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. . . . [A] diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. . . .

APPENDIX M

FEDERAL MOTOR CARRIER SAFETY REGULATIONS

The relevant portions of the Federal Motor Carrier Safety Regulations, General and Qualifications of Drivers (Federal Highway Administration, Department of Transportation) 49 C.F.R. §§ 390 and 391 (1992) are:

§ 390.3 General Applicability.

(a) The rules in subchapter B of this chapter are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce.

§ 390.5 Definitions.

In this subchapter:

Commercial motor vehicles means any self-propelled or towed vehicle used on public highways in interstate commerce to transport passengers or property when:

(a) The vehicle has a gross vehicle weight rating or gross combination weight rating of 10,000 or more pounds; or

(b) The vehicle is designed to transport more than 15 passengers, including the driver;

§ 391.41 Physical qualifications for drivers.

(b) A person is physically qualified to drive a motor vehicle if that person—

(3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control;

(10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen)

or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

Department of Transportation Federal Highway Administration Qualification of Drivers; Waivers; Diabetes, 58 Fed.Reg. 40690 (July 29, 1993) (to be codified at 49 C.F.R. § 391) provides:

Summary: The FHWA announces its decision to issue waivers to certain insulin-using diabetic drivers of commercial motor vehicles (CMVs) from the qualification requirements contained in the Federal Motor Carrier Safety Regulations (FMCSRs). The FHWA will immediately begin accepting waiver applications from individuals and will continue to accept such applications for waivers until April 30, 1994. All applications must be postmarked by April 30, 1994 and those received after that date will not be accepted. If granted, waivers will be valid for a period of three years unless revoked for failure by the driver to comply with the conditions of the waiver, or until resolution of a concurrent rulemaking action, which ever occurs first.

Discussion—

. . .

The FHWA believes the waiver program is entirely consistent with the public interest, particularly since the enactment of the Americans with Disabilities Act directed the FHWA to undertake, within two years of the enactment of Title I of that legislation, a thorough review of the physical qualification regulations "in order to ascertain whether the standards conform with current knowledge about the capabilities of persons with disabilities and currently

available technical aids and devices." S.Rep. 116, 101st Cong. 1st Sess. at 27. This mandate was issued, in part, based on information which showed that individuals with disabilities experience staggering levels of unemployment and poverty. For instance, a Lou Harris poll referenced in the report found that "two-thirds of all disabled Americans between the ages of 16 and 64 are not working at all; yet, a large majority of those not working say that they want to work." *Id.* at 9. This waiver program will afford opportunities for employment for otherwise qualified individuals with disabilities while the study is in progress.

. . .

APPENDIX N

THE ISSUES OF THE CITY OF DALLAS ON APPEAL

The City of Dallas presented the following issues on appeal to the Fifth Circuit:

STATEMENT OF THE ISSUES

1. Whether the City of Dallas' Driver Safety Program violated the Rehabilitation Act of 1973 as amended 29 U.S.C. § 701 et seq.?
2. Whether the district court erred in certifying as a class the two groups of City employees as handicapped?
3. Whether the City of Dallas' Driver Safety Program violated the First and Fourteenth Amendments of United States Constitution?
4. Whether the City of Dallas' Driver Safety Program violated 42 U.S.C. § 1983?
5. Whether the City of Dallas' Driver Safety Program violated the Texas Commission on Human Rights Act, Tex.Rev.Civ.Stat. Art. 5221(k)?
6. Whether the district court erred as a matter of law by not making specific findings of fact and stating separate conclusions of law regarding reputation damages awarded to Chandler and Maddox?

Page x of the Brief of Appellant City of Dallas, Texas, December 23, 1992.

No. 93-1250

Supreme Court, U.S.
FILED
MAR - 7 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX, and OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

THE CITY OF DALLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SAM A. LINDSAY
City Attorney
Counsel of Record
FRANCISCO JAVIER GARZA
Assistant City Attorney
City Attorney's Office
1500 Marilla Street
7D North City Hall
Dallas, Texas 75201
(214) 670-3519

Attorneys for Respondent

March 7, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has applied this Court's standard on whether an individual is handicapped?

2. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals, after reviewing the evidence by the district court, has applied this Court's standard and found that the petitioners, as a matter of law, were not otherwise qualified?

3. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has determined that individualized inquiries are needed in order to determine if someone is handicapped or otherwise qualified under the Rehabilitation Act?

4. Did the Fifth Circuit Court of Appeals violate the clearly erroneous rule by setting aside the district court's erroneous view of the law?

5. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has applied this Court's standard that due process requires only a hearing by an impartial trier of fact?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 2

Statement of the Case 2

A. COURSE OF PROCEEDINGS AND DISPOSITION 2

B. STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT 7

ARGUMENTS SUPPORTING DENIAL OF THE WRIT 9

I. INDIVIDUALS WITH HANDICAPS 9

A. DEFINING HANDICAP 9

B. REGARDED AS HANDICAPPED 15

II. OTHERWISE QUALIFIED 17

III. CLASS CERTIFICATION 24

IV. CLEARLY ERRONEOUS STANDARD 25

V. DENIAL DUE PROCESS 26

VI. CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 26

Arnett v. Kennedy, 416 U.S. 134 (1974) 27

Chandler v. City of Dallas, 958 F.2d 85 (5th Cir. 1992) 7

Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993) ..... *passim*

Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991) 10, 17, 18, 21

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 27

Collier v. City of Dallas, No. 86-1010 (5th Cir. August 19, 1986) (unpublished) 12, 22

Daley v. Koch, 892 F.2d 212 (2nd Cir. 1989) 16

Davis v. Meese, 692 F.Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989) 20

Davis v. Sherer, 468 U.S. 183 (1984) 20, 27

de la Torres v. Bolger, 610 F.Supp. 593 (N.D. Tex. 1985), *aff'd*, 781 F.2d 1134 (5th Cir. 1986) 16

Doe v. New York Univ., 666 F.2d 761 (2nd Cir. 1981) 18

East Texas Motor Freight System v. Rodriguez, 431 U.S. 395 (1977) 25

Elstner v. Southwestern Bell Telephone Co., 659 F.Supp. 1328 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988) 14, 16, 17, 24

Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) 14, 16, 24

TABLE OF AUTHORITIES – Continued

Page

Gilbert v. Frank, 949 F.2d 637 (2nd Cir. 1991) 14

Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607 (1980) 20

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 26

Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985) 14, 16, 24

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 26

Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 15

School Board of Nassau County v. Arline, 480 U.S. 273 (1987) 9, 10, 11, 17, 23, 25

Serrapica v. New York, 708 F.Supp. 64 (S.D. N.Y. 1989) 20

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 17, 23

Tudyman v. United Airlines, 608 F.Supp. 739 (C.D. Cal. 1984) 16

United States v. E. I. Du Pont de Nemours & Co., 353 U.S. 586 (1957) 26

United States v. General Motors Corp., 384 U.S. 127 (1966) 26

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 26

United States v. Singer Mfg. Co., 374 U.S. 174 (1963) 26

United States v. United States Gypsum Co., 333 U.S. 364, *reh. den.*, 333 U.S. 869 (1948) 26

TABLE OF AUTHORITIES – Continued

Page

Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992) 16

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment I 8

U.S. Constitution Amendment XIV, §1 8

STATUTES, REGULATIONS AND RULES

28 U.S.C. §1254(1) 2

29 U.S.C. §701 *et seq.* (Rehabiliataion Act) ..... *passim*

31 U.S.C. §6701 7

42 U.S.C. §1983 ..... 7, 8

42 U.S.C. §12101, *et seq.* (Americans with Disabilitites Act) 10

14 C.F.R. §67.13(f)(1) (1984) 20

14 C.F.R. §67.17(f)(1) (1984) 20

14 C.F.R. §67.65(f)(1) (1984) 20

29 C.F.R. §1630.2 (1993) 23

29 C.F.R. §1630.2(h) (1993) 13

29 C.F.R. §1630.2(i) (1993) 18

29 C.F.R. §1630.2(j) (1993) 13, 14

45 C.F.R. §84.3(j)(2)(i) (1992) 11

45 C.F.R. §84.3(j)(2)(ii) (1992) 11

49 C.F.R. §391 (1992) 3, 22

TABLE OF AUTHORITIES – Continued

Page

58 Fed. Reg. 40690 (July 29, 1993) (to be codified at 49 C.F.R. §791) 22

Fed. R. Civ. P. 23(a) 25

Fed. R. Civ. P. 52(a) 9, 25, 26

Tex. Rev. Civ. Stat. Ann. art. 5221K (1987)..... 4, 7

City of Dallas Administrative Directive 3-3..... 4

No. 93-1250

In The

Supreme Court of the United States

October Term, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX, and OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

THE CITY OF DALLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

The City of Dallas ("City") files this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Response"), asking this Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued September 20, 1993 by the United States Court of Appeals for the Fifth Circuit. In support of this request, the City respectfully shows the Court as follows:

JURISDICTION

The Court's jurisdiction of this appeal is based on the judgment and opinion of the Fifth Circuit Court of Appeals entered on September 20, 1993. The Petitioners' petition for panel rehearing and suggestion for rehearing en banc were denied by the Fifth Circuit on November 2, 1993. This court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION

Petitioners' course of proceedings and disposition is essentially correct, but incomplete. Notably absent is a detailed description of the specific holdings of the Fifth Circuit Court of Appeals, and Respondent respectfully urges this Court to review these holdings with Petitioner's statements.

The Fifth Circuit held that Adolphus Maddox ("Maddox") was neither handicapped, regarded as handicapped by the City, or otherwise qualified for his position. The circuit court also specifically held that Lyle Chandler ("Chandler") had failed to prove he was neither handicapped, regarded as handicapped by the City, nor otherwise qualified under the Rehabilitation Act, ("Act"), 29 U.S.C. §701 *et seq.*

The Fifth Circuit held that neither Maddox nor Chandler was handicapped simply because they could

not meet one requirement of a particular job, and therefore an impairment that affects only a narrow range of jobs does not substantially limit a person's major life activities. The appeals court also held that both Chandler and Maddox appear to have been capable of safely performing all duties of their respective positions except driving.[1] Simply stated, Chandler and Maddox failed to adduce sufficient evidence to support a finding of law that the City regarded them as handicapped.

The appeals court also concluded that as a matter of law, a driver with insulin-dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. §391.41 presents a genuine substantial risk that he or she could be injured or could injure others.[2] The Fifth Circuit held that the district court clearly erred as a matter of law by holding that petitioners were otherwise qualified for primary driver positions.

The Fifth Circuit found that the district court improperly certified two subclasses of plaintiffs under the Rehabilitation Act because individual determinations need to be made in order to determine if someone is handicapped or otherwise qualified.

The Fifth Circuit concluded as a matter of law that petitioners failed to establish any causal nexus between protected free speech and any injury they may have incurred. Furthermore, the court concluded that the City did have a rational basis for adopting and maintaining its Driver Safety Program ("Program") and its classification

---

[1] *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993).

[2] *Id.* at 1395.

of Chandler and Maddox. The court also held that the demotion hearing afforded to Chandler met all constitutional requirements.[3]

Petitioners have not appealed the Fifth Circuit's ruling that they failed to prove a violation under the Texas Commission on Human Rights.[4]

B. STATEMENT OF FACTS

In 1978, the City adopted a Driver Safety Program (Administrative Directive 3-3) ("AD 3-3") to reduce the risk of loss to the City, its employees, and the public resulting from vehicular collisions involving City employees. AD 3-3 established certain physical standards for City employees who drive on public roads as an intrinsic part of their job duties. Employees of this type are referred to as primary drivers. The physical standards required by AD 3-3 were patterned on safety regulations promulgated by the United States Department of Transportation. If an employee did not meet these standards, he could not be certified as a primary driver and thus was ineligible for primary driver positions.[5]

Two of the medical standards for primary drivers are of particular importance to this petition. A primary driver: (1) cannot have an established medical history of

---

[3] *Id.* at 1396-1397.

[4] Tex. Rev. Civ. Stat. Ann. art. 5221K (1987).

[5] No waiver was available for failure to meet a physical standard when AD 3-3 was initially adopted. Waivers, at the time of trial, were allowed for all physical standards except the vision standard and drug or alcohol abuse.

diabetes mellitus severe enough to require insulin for control; and (2) must have 20/40 vision (corrected) and a field of vision of at least 70 degrees in the horizontal meridian in each eye.

Chandler has diabetes mellitus that requires insulin for control. Maddox has impaired vision in his left eye that cannot be corrected to meet the minimum standards of AD 3-3. Both of these petitioners held jobs with the City that were classified as primary driver positions.[6]

Chandler has required insulin for control of his diabetes since 1977 and has been an employee of the City of Dallas since 1981. In 1985, Chandler failed his initial driver's physical because of his diabetes. At that time he was employed as an Electrical Repairer T-9, a primary driver position. Chandler was allowed to retain that position on the condition that he be driven by another coworker when he had to go to another work site.

Chandler has had at least two major on-the-job hypoglycemic episodes in which he was completely unable to function due to his diabetic/insulin condition and emergency medical treatment was required. He also admits that he has had numerous other minor hypoglycemic

---

[6] The positions held by Chandler and Maddox were subsequently reclassified as non-primary driver jobs. The petitioners have never alleged any impropriety in either the original classification or in the later reclassification, nor have they contested the City's assertion that these positions were reclassified because the amount of driving associated with both positions had decreased. Additionally, in January 1990, Chandler subsequently applied for and received a physical waiver allowing him to apply for primary driver positions.

incidents, during which he was confused and addled. Chandler has also had a series of safety and misconduct incidents on the job. In 1986, he caused a serious electrical accident that resulted in injuries to himself and two co-workers. That same year, after a subsequent safety violation and violation of City personnel rules, Chandler was demoted to Electrical Repairer T-7.

Maddox was hired by the City in 1982 and was promoted to Plant Mechanic T-7 in 1983. Maddox failed his initial driver's physical in 1985 because of poor vision in his left eye. Among other problems, his vision in his left eye cannot be corrected to better than 20/60 and his horizontal field of vision in that eye is less than 70 degrees. As with Chandler, Maddox was allowed to retain his then current position (which was also classified as a primary driver position) on the condition that a co-worker drive him when he needed to work at other facilities.

Chandler and Maddox were able to apply for promotion to all positions in the City which were not primary driver positions for which they met the minimum requirements.[7] In December 1985, Chandler and Maddox

---

[7] Petitioners claim that class members have been barred from four thousand (4,000) City jobs because of their impairments. No evidence exists that petitioners were prevented from applying for that many positions. The "4,000" number was derived from a misreading of the testimony. If the Court were to accept the petitioners' analysis on 4,000 primary driver positions, the fact that in 1985 the City had 13,500 total positions, petitioners would then have been eligible for over 9,500 jobs that were not classified as primary driver positions. Moreover, no evidence was presented regarding petitioners' qualifications for those "4,000" jobs. Some of these jobs would be lower posi-

filed suit against the City, alleging that the Program discriminated against them in violation of the Rehabilitation Act, 29 U.S.C. §§701-796, the First and Fourteenth Amendment of the U.S. Constitution, and 42 U.S.C. §1983. The complaint was subsequently amended to include claims under the Revenue Sharing Act, 31 U.S.C. §6701, and the Texas Commission on Human Rights Act, Tex. Rev. Civ. Stat. Ann. art. 5221K.

The district court certified two classes of plaintiffs (those with substandard vision and those with insulin-dependent diabetes) for purposes of injunctive relief. After a bench trial, the court rendered judgment for the plaintiffs, but failed to make findings of fact and conclusions of law. The City appealed, and the Fifth Circuit vacated the judgment and remanded the case "for detailed findings of fact and concomitant conclusions of law."[8] On remand, the district court reinstated its judgment and made findings of fact and conclusions of law. The City again appealed, and the Fifth Circuit reversed and rendered on all counts on September 20, 1993.[9]

SUMMARY OF ARGUMENT

The Fifth Circuit's application of the Rehabilitation Act to the present case does not warrant review by this

---

tions than those held by petitioners, and some would be promotions for which petitioners would not be qualified for, regardless of the driving classification.

[8] *Chandler v. City of Dallas*, 958 F.2d 85, 90-91 (5th Cir. 1992).

[9] *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993).

Court because the decision correctly applies this Court's precedent and applicable law, and there is no conflict among the circuits.

The City adopted AD 3-3 in 1978. This directive disqualifies City employees with specified psychiatric and physical conditions from operating City vehicles as a primary duty of their employment. Contrary to the claims of petitioners, and the class members they represent, AD 3-3 does not discriminate against the handicapped in violation of the Rehabilitation Act, 29 U.S.C. §701 *et seq.*, 42 U.S.C. §1983 and the First and Fourteenth Amendments of the United States Constitution.

The Fifth Circuit applied the proper standard by finding that as a matter of law, neither Chandler nor Maddox was either "handicapped" or "otherwise qualified." The appeals court did find that both petitioners had physical ailments, however, neither provided any evidence that he was unable to perform any of life's major life activities. Moreover, the Fifth Circuit ruled that petitioners provided no evidence that the City regarded them as handicapped. Chandler and Maddox were accommodated and retained in their positions. The only inconvenience that petitioners endured was a temporary restriction from applying for certain positions. This limited restriction is not "substantially limiting" for the purpose of the Act.

The Fifth Circuit was also correct in holding that Chandler and Maddox were not "otherwise qualified" because of the safety risks they posed in the positions they occupied. Petitioners failed to provide any evidence

that a reasonable accommodation existed to eliminate or reduce the substantial risk inherent in driving.

The court of appeals held that class certification was inappropriate in this case because an individualized determination had to be completed in order to determine if the proposed class members were either handicapped and otherwise qualified as required by this Court's precedent. The Fifth Circuit's holding was correct in finding that Chandler's due process rights were not violated because the demotion hearing he received was constitutionally adequate.

The Fifth Circuit's decision was not bound by the clearly erroneous standard of Fed. R. Civ. P. 52(a) because this rule only applies to findings of fact. This rule does not apply to conclusions of law. The court of appeals set aside the district court's conclusions of law because they were based on erroneous views of the law. The holding is consistent with this Court's previous decisions.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. INDIVIDUALS WITH HANDICAPS

A. DEFINING HANDICAP

The Fifth Circuit's application of the Act, 29 U.S.C. §§701-796i, to the present case does not warrant review by this Court. The decision does not conflict with any other circuit court opinion. Furthermore, the court of appeals applied this Court's holding in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

Petitioners have sought to prove a violation of §504 of the Act, which provides in pertinent part that "no otherwise qualified handicapped individual," as defined in [29 U.S.C. §706(8)], shall solely by reason of his handicap be excluded from participation in any program receiving federal financial assistance.[10] The Act defines an individual with handicaps for employment purposes as a person "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. §706(8)(B).

An individual seeking recovery under the Act must at minimum, establish each of the following four elements:

(1) that he was an individual with a handicap;

(2) that he was "otherwise qualified" for the position;

(3) that he was adversely treated "solely by reason" of his handicap; and

(4) the treatment occurred under a program or activity receiving federal financial assistance.[11]

---

[10] The Act has been amended since this suit was filed in order to incorporate the language and standards of the Americans with Disabilities Act (ADA). 42 U.S.C. §12101 *et seq.* Among the changes was the substitution of the term "disability" for the term "handicap." Both terms are used in this Response.

[11] *School Board of Nassau County v. Arline*, 480 U.S. 273, 277 (1987); *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991).

The Fifth Circuit found, as a matter of law, that petitioners were neither "handicapped" nor "otherwise qualified" as defined by the Act. The court of appeals did not rule on elements three and four. *Chandler*, 2 F.3d at 1396.

Petitioners claim they are handicapped because they have physical impairments which limit a major life activity, their ability to work, and that the City regarded them as handicapped by not allowing them to promote into "primary driver" positions. The court of appeals found both of these contentions to be without merit.

The Supreme Court has used the Department of Health and Human Services (DHHS) regulations to help interact what is meant by "physical impairments" and "major life activities." *Arline*, 480 U.S. at 280. Those regulations define a physical impairment as "[A]ny physiological disorder or condition, cosmetic disfiguration, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal, special sense organs; respiratory, including speech organs, cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine."[12] "Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[13]

Chandler and Maddox have physical ailments, but that alone does not rise to the level of being handicapped under the law. The real issues are: do their physical ailments equate to the legal definition of a "handicap,"

---

[12] 45 C.F.R. §84.3(j)(2)(i) (1992).

[13] 45 C.F.R. §84.3(j)(2)(ii) (1992).

and if so, do these handicaps limit their abilities to accomplish any of major life activities? The Fifth Circuit, as a matter of law, accepted Maddox's testimony as true and held that he was not handicapped because his vision, which could be corrected to 20/60, did not limit him from any of major life activities.[14] The Fifth Circuit had previously held that a person is not per se handicapped if his vision can be corrected to only 20/200.[15] The appeals court also found that Chandler failed to show that he was unable to perform a major life activity. Equally important was Chandler's testimony that he did not consider his diabetes to be a substantial limitation on his major life activities.[16] The court found that as a matter of law, Chandler and Maddox had failed to show they were handicapped under the first prong of the statutory definition of an individual with a handicap.[17]

The American Diabetes Association ("Association") in its Amicus Brief argues that Chandler, simply having diabetes automatically classifies him as handicapped under the Act. They cite no legal precedent to support this finding. According to the Association, the only issue is whether the person is suffering from a physical ailment. The Association fails to complete the legal analysis required by the Act and the ADA.[18]

---

[14] Class Certification Transcript Vol. 15, pp. 51-52.

[15] *Collier v. City of Dallas*, No. 86-1010 (5th Cir. August 19, 1986) (unpublished).

[16] Transcript Vol. 18, pp. 41-42.

[17] *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (1993).

[18] Petitioners and the American Diabetes Association strenuously argue that the Fifth Circuit's decision will have an

The EEOC's ADA Interpretive Guidelines on Title I state that the existence of an *impairment* is to be determined without regard to mitigating measures such as medicines. *See* 29 C.F.R. §1630.2(h) (1993) (emphasis added). A physical impairment does not equal a handicap as the Association would tend this Court to believe. The EEOC stressed in its regulations that the determination of whether a physical impairment existed was only the initial step in making a determination of disability. "An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities."[19] The Association does not complete the legal analysis because they are unable to show how Chandler was substantially limited from a major life activity.

Petitioners argue that the diabetes and visual problems of Chandler and Maddox are serious because they are permanent and both have had these impairments for decades, and therefore, they are per se handicapped. The problem with petitioners' analysis is that they too fail to complete the legal analysis required both under the Act and the ADA. The Act and the ADA do not attempt to create a "laundry list" of impairments that are disabilities as the petitioners seem to argue. The EEOC regulations to the ADA specifically state:

---

adverse effect on the ADA. This case was filed in 1985 and not under the laws or regulations of the ADA. The ADA regulations, however, are helpful in interpreting the terms and meaning of the Act.

[19] 29 C.F.R. §1630.2(j) (1993). *See also* 29 U.S.C. §706(8)(B)(i) (1993).

> "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but nor for others, . . . "[20]

The Equal Employment Opportunity Commission (EEOC) has stated that a determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis. An individual is not substantially limited in a major life activity, if the limitation does not amount to a significant restriction when compared to the abilities of the average person.[21] Thus, an individual is not substantially limited in working merely because he is unable to perform a particular job, aspect of the job, or narrow range of jobs.[22]

The Association cites several cases which it claims holds that certain physical impairments are per se handicaps regardless of mitigating measures. They cite these examples to argue that individuals suffering from diabetes should therefore be classified as handicapped. The Association, however, fails to include that *Gilbert v. Frank*[23]

---

[20] 29 C.F.R. §1630.2(j).

[21] *Id.*

[22] *See, Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985).

[23] 949 F.2d 637 (2nd Cir. 1991), (Plaintiff with kidney cysts was handicapped because his physical impairment was the reason he was ***denied employment*** with the Defendant).

and *Reynolds v. Brock*,[24] also found that the individuals suffering from their physical ailments were also substantially limited from working when they were either denied employment or terminated because of their physical ailments. These cases are not in conflict with the Fifth Circuit's holding and do not present a conflict among the circuits.

The Fifth Circuit simply concluded that although Chandler and Maddox had physical impairments, neither was handicapped as a matter of law because neither individual was substantially limited from performing a major life activity.

B. REGARDED AS HANDICAPPED

Petitioners argue in the alternative that they are handicapped because the City regarded them as having a disability that substantially limited a major life activity.[25] Simply restated, since the City would not promote Chandler and Maddox into primary driver positions, they believe that this alone is sufficient to meet the requirements of the Act.

The Fifth Circuit ruled that the district court erred as a matter of law by accepting the petitioners' contentions, equating the partial, temporary restrictions on their driving privileges as the City "regarding" them as unable to

---

[24] 815 F.2d 571 (9th Cir. 1987), (Plaintiff, whose medication at times controlled her epileptic seizures, was handicapped because her physical impairment was the reason she was ***terminated*** by the Defendant).

[25] 29 U.S.C. §706(8)(B)(iii) (1993).

perform the major life function of working. The court of appeals emphasized that several circuit courts have addressed the issue of how limiting an employer must consider an employee's impairment to be before the employer is held to regard the employee as handicapped.[26] The courts that have ruled on this issue have consistently held that an impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease the individual's ability to obtain satisfactory employment otherwise is not "substantially limiting" for the purpose of the Act.[27] That the City retained Chandler and Maddox on its work force and accommodated their partial, temporary loss of driving privileges conclusively establishes that it did not regard them as unable to work.

The City was aware of Chandler's diabetes and Maddox's visual problems when they applied for work, and the City hired them without regard to their medical conditions. When their jobs were classified as primary driver positions, the City did not terminate or demote them.[28]

---

[26] *Chandler*, 2 F.3d at 1391-1392.

[27] *Forrisi v. Bowen*, 794 F.2d 934 (4th Cir. 1986); *Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988); *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *Daley v. Koch*, 892 F.2d 212 (2nd Cir. 1989); *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992); *de la Torres v. Bolger*, 610 F.Supp. 593 (N.D. Tex. 1985), *aff'd*, 781 F.2d 1134 (5th Cir. 1986); *Tudyman v. United Airlines*, 608 F.Supp. 739 (C.D. Cal. 1984).

[28] Other Circuit courts have found employees who were terminated or demoted because of physical ailments not to be regarded as handicapped. *Forrisi v. Bowen*, 794 F.2d 93i, 934 (4th Cir. 1986), (employee terminated for his impairment (acro-

Instead, both employees were retained in their positions and accommodated by allowing other individuals to do the driving for them. The petitioners were simply not allowed to apply for primary driver positions, they were allowed however, to apply for any other position that was not a primary driver position. No evidence exists that petitioners were barred from applying for "thousands" of positions. As a result of these uncontested facts, the Fifth Circuit held as a matter of law that petitioners were not regarded as handicapped by the City.

II. OTHERWISE QUALIFIED

For the sake of argument, if petitioners are deemed to be handicapped, they have failed to show that they were "otherwise qualified" for the positions desired. The Fifth Circuit, in applying this Court's standard of *School Board of Nassau County v. Arline*[29] found that petitioners failed to show they were otherwise qualified.

An "otherwise qualified" individual must be able to perform the "essential functions" of his job. In *Chiari*, the

---

phobia), but the court found his impairment was not a substantial limitation in his employability); *Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328, 1343 (S.D. Tex. 1987), *aff'd*, 862 F.2d 881 (5th Cir. 1988) (employee's injured knees prevented him from performing an intrinsic part of his job, employee demoted, court found that restrictions did not constitute a substantial limitation on his ability to work since the company retained him).

[29] 480 U.S. 273 (1987). *See also Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). This Court defined an otherwise qualified person as one who is able to meet all of a program's requirements in spite of his handicap.

Fifth Circuit said "courts which have applied §504 unanimously have held that a handicapped individual cannot perform the essential functions of a job if his handicap poses a significant safety risk to those around him".[30] It must also be determined if a reasonable accommodation by the employer would enable the employee to perform those functions.

An employer is allowed to consider potential safety risks as well as seriousness of the potential harm when making a decision about employment criteria.[31] The Fifth Circuit stated that a two party inquiry is required in order to determine whether an individual is otherwise qualified. First, can the individuals perform the essential functions of the job, and secondly, if the individual is not able to perform the essential functions, is there a reasonable accommodation the City can provide which would enable the employer to perform those functions?[32]

Petitioners have never contested the City's assertion that driving is an essential function of every primary driver position.[33] The Fifth Circuit found this to be a fatal

---

[30] *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991).

[31] 29 C.F.R. 1630.2(i) (1993). *See, Doe v. New York Univ.*, 666 F.2d 761 (2nd Cir. 1981).

[32] *Chandler*, 2 F.3d at 1393; *Chiari*, 920 F.2d at 317.

[33] Primary Drivers are those City employees who are certified to operate a motor vehicle on public thoroughfares for the City as an *intrinsic* part of their job duties. Secondary Drivers are those City employees who are certified to operate a motor vehicle on public thoroughfares for the City as an *adjunct* duty to their job. Tertiary Drivers are those City drivers who operate motor vehicles and automotive equipment on City property

legal flaw in petitioners' argument because, in taking this approach, petitioners failed to produce sufficient evidence that would support a finding that they were otherwise qualified for primary driver positions.[34]

The petitioners and the Association argue that the Fifth Circuit's decision will automatically exclude all insulin-dependent diabetics from jobs requiring any driving. This argument is totally without foundation because the court of appeals clearly stated that the physical impairments of AD 3-3 only prevented an individual from holding a position where driving was an intrinsic function of that job. The record shows that for a short period of time that Chandler was prevented from promoting into these positions, but at the same time he could seek promotion to any other position where driving was not an intrinsic function of the job.

The Fifth Circuit did hold that as a matter of law, a primary driver with insulin-dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. §391.41[35] presented a genuine substantial risk that the driver could injure himself or others, and therefore, is not

---

where public access is limited. Only Primary Drivers are subject to the physical standards of the Program. AD 3-3.

[34] *Chandler*, 2 F.3d at 1394.

[35] Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, filed of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green and amber.

otherwise qualified.[36] The circuit court, however, did leave open the possibility that the court's holding would be modified when medical science advances to the stage where it can be determined that individuals with these impairments no longer present a substantial risk.[37] But, as Chandler's two severe hypoglycemic reactions and numerous other minor hypoglycemic incidents while employed with the City amply demonstrate, it has not yet reached that point.[38] This Court has held that a risk of one in a thousand may well be a significant one.[39] The City was not required to provide any evidence that Chandler and Maddox ever had on-the-job accidents, nor was the City required to provide statistical evidence

---

[36] *Chandler*, 2 F.3d at 1395.

[37] *Id.* Footnote 52. "We nonetheless share the hope . . . that medical science will soon progress to the point that exclusions on a case by case basis will be the only permissible procedure; or, hopefully, methods of control may become so exact that insulin-dependent diabetics will present no risk of ever having a severe hypoglycemic episode." *Davis v. Meese*, 692 F.Supp. 505, 521 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989).

[38] Federal courts have uniformly held that insulin-dependent diabetics are not otherwise qualified for positions involving driving or other high risk activities. *Davis v. Meese*, 692 F.Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989) (exclusion of all insulin-dependent diabetics from FBI upheld); *Serrapica v. New York*, 708 F.Supp. 64 (S.D. N.Y. 1989) (diabetic sanitation truck driver held not "otherwise qualified"). *See also* 14 C.F.R. §§67.13(f)(1), 67.17(f)(1), 67.65(f)(1) (1984) (insulin-dependent diabetics may not receive pilots license).

[39] *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 655 (1980) (Stevens, J., plurality opinion).

posed by an insulin-dependent diabetic or an individual with impaired vision in the work place.[40]

Petitioners and the Association argue in their petitions that the Fifth Circuit's decision is legally flawed because it fails to do an individual analysis on whether Chandler and Maddox were "otherwise qualified." A close reading of the Fifth Circuit's opinion shows that an individualized inquiry was conducted. The court found that where driving was an intrinsic part of the position, which in this case it was, an individual with insulin-dependent diabetes or with Maddox's impaired vision, was not otherwise qualified.[41] Petitioners and the Association argue that if an individualized inquiry had been conducted, it would have shown that Chandler and Maddox were able to safely drive for the City. This argument is totally contrary to their initial position that both individuals suffered from permanent physical impairments that prevented them from performing some of life's major activities. The Association even acknowledges in its argument, that while at work Chandler experienced diabetic reactions requiring hospitalization when his disease was out of control.[42] Had these reactions occurred while Chandler was driving a City vehicle, results could have been catastrophic; he could have fatally injured himself or someone else.

---

[40] *Chiari*, 920 F.2d at 313.

[41] *Chandler*, 2 F.3d at 1395.

[42] See Association's Petition, p. 11, fn. No. 3.

If this Court were to hold otherwise, it would send a message to every employer, that even though an individual with a physical impairment presents a genuine risk that he will harm himself or others, an employer must place them in that position until they actually cause an accident. This would do nothing but put all employers in the defensive position of explaining why they placed an individual who was known to be a substantial risk, in such a position.[43]

The Association correctly points out that the Federal Highway Administration has amended the federal licensing regulation which prevented insulin-dependent diabetics from obtaining interstate commercial driver licenses. The regulations now allow for insulin-dependent diabetics to obtain waivers. This amendment occurred on July 29, 1993. *See*, 58 Fed. Reg. 40690 (July 29, 1993).[44] The City has taken this individualized approach for years because it has allowed for these waivers since October 1, 1989,[45] and Chandler received his waiver in January, 1990.[46] This is a clear indication that the City has been concerned about the rights of those who are physically impaired several years before the passage of the ADA.

---

[43] As the Fifth Circuit aptly stated, "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident." *Chandler*, 2 F.3d at 1395, *citing Collier v. City of Dallas*, No. 86-1010, slip op at 3 (5th Cir., August 19, 1986) (unpublished).

[44] To be codified at 49 C.F.R. §391(b).

[45] See District Court Findings of Fact, No. 55.

[46] See District Court Findings of Fact, No. 56.

The next step of the analysis is to determine whether a reasonable accommodation exists to either eliminate the risk or reduce it to an acceptable level.[47] Chandler and Maddox failed to present any evidence that reasonable accommodation was available that would eliminate the substantial risk inherent in their driving. The Fifth Circuit found this lack of evidence to be fatal, given petitioner's burden of establishing that a reasonable accommodation was possible for the positions they sought.[48] Therefore the district court erred as a matter of law in holding that Chandler and Maddox were otherwise qualified for primary driver positions.

The City did provide evidence that it took all reasonable steps to accommodate Chandler and Maddox without abandoning the legitimate purposes of AD 3-3. Chandler and Maddox testified they were hired and permitted to drive for the City until the Program was implemented for their positions. Afterwards, Chandler and Maddox were permitted to retain their positions even though they were classified as primary driver positions. Supervisors and co-workers drove petitioners when they needed to work at other sites. Finally, when the driving duties of their original positions, and the positions they hoped to promote to lessened, the positions were reclassified as secondary driver positions.[49] The only

---

[47] *School Board of Nassau County v. Arline*, 480 U.S. 273, 288 (1987); *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), 29 C.F.R. §1630.2 (1993).

[48] *Chandler*, 2 F.3d at 1395.

[49] Transcript Vol. 17, pp. 42-43; Vol. 18, p. 25 and Vol. 20, p. 99.

manner in which petitioners were not accommodated was a temporary restriction on their driving and positions to which they could promote. In this case the City went far beyond the mandate of the Act to accommodate the petitioners.

III. CLASS CERTIFICATION

The Fifth Circuit ruled that class certification and class relief were inappropriate as a matter of law in the instant case.[50] This holding was based on the fact that handicap discrimination claims are particularly unsuited to resolution through class determinations, in part because of the individualized fact finding that is necessary just to determine who is in the protected group of workers.

> "The question of who is a handicapped person under the [Rehabilitation] Act is best suited to a 'case-by-case determination,' as courts assess the effects of various impairments upon various individuals. The definitional task cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one – whether the particular impairment constitutes for the particular person a significant barrier to employment."[51]

---

[50] *Chandler*, 2 F.3d at 1396.

[51] *Forrisi*, 794 F.2d at 933 (citations omitted); *see also Jasany*, 755 F.2d at 1249; *Elstner*, 659 F.2d at 1342.

The uniqueness of each class member's claim negates the Rule 23 prerequisites of typicality, commonality, and representativeness.[52] The district court's across-the-board certification of two subclasses of City employees ignores the individualized treatment that each of their claims deserves. Moreover, plaintiff's class representatives must be part of the class to be certified, and must "possess the same interest and suffer the same injury as the class members."[53] Since there was no finding by the district court that Maddox and Chandler met this test, there should have been no class certification with respect to the two putative subclasses.

This Court has stated that a case-by-case determination is also required in order to determine whether an impairment constitutes a substantial limitation to a major life activity. "Such an inquiry is *essential* if §504 is to achieve its goal of protecting handicapped individuals . . . "[54] The district court failed to make this case-by-case determination; therefore, class certification was improper.

IV. CLEARLY ERRONEOUS STANDARD

Petitioners argue that the court of appeals violated the clearly erroneous rule by reversing the district court's findings of fact. Specifically, petitioners argue that Fed. R. Civ. P. 52(a) precludes a court of appeals from reversing a district court's findings of fact if that court's account of

---

[52] *See* Fed. R. Civ. P. 23(a).

[53] *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 403 (1977).

[54] *Arline*, 480 U.S. at 287 (emphasis added).

the evidence is plausible in light of the record and cite two Supreme Court cases to support this proposition.[55]

Petitioners fail to address the fact that the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) does *not apply* to conclusions of law. The Supreme Court recognized that courts of appeals have an obligation to set aside conclusions of law that rest on erroneous views of the law.[56] The Court stated that if a trial court bases its findings upon a mistaken impression of applicable legal principles, the court of appeals is not bound by the clearly erroneous standard.[57]

In the case at hand, the court of appeals held that petitioners were not handicapped and not otherwise qualified *as a matter of law.* The court of appeals was not bound by the clearly erroneous standard when it concluded that the City had not violated the Act or the constitutional rights of the petitioners.

V. DENIAL DUE PROCESS

Chandler claimed he was denied due process in that he was not allowed to present certain evidence with

---

[55] *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985), *Pullman-Standard v. Swint,* 456 U.S. 273 (1982).

[56] *United States v. United States Gypsum Co.,* 364, *reh. den.* 333 U.S. 869 (1948); *United States v. E. I. Du Pont de Nemours & Co.,* 353 U.S. 586 (1957); *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960); *United States v. Singer Mfg. Co.,* 374 U.S. 174 (1963); *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844 (1982).

[57] *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844 (1982).

regards to his demotion.[58] The court of appeals found that the demotion hearing provided to Chandler was "constitutionally adequate."[59] Chandler simply failed to show that his demotion was effected without due process. the district court held in its conclusion of law that Chandler was denied the opportunity to present certain evidence with regard to his demotion.[60] Chandler never claimed or established he was denied a hearing or that the trial board was not an impartial decision maker which is what he would have to establish to prevail on this claim.[61] The mere fact that a tribunal rejects one's line of reasoning does not constitute a denial of one's due process.[62]

VI. CONCLUSION

None of the issues Chandler, Maddox or the Association presents is of precedential value that warrants review by this Court. Additionally, there is no conflict among the circuits regarding any of the issues presented. The Fifth Circuit meticulously reviewed the facts and

---

[58] Petitioners do not appeal the Fifth Circuit's finding that the City did not violate their First Amendment or Equal Protection Rights.

[59] *Chandler*, 2 F.3d at 1397.

[60] See District Court Conclusions of Law, No. 27.

[61] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

[62] *Davis v. Sherer*, 468 U.S. 183 (1984); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

applied the correct legal standards in reaching its conclusions. For these reasons stated herein, this Court should deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

Office Of The City Attorney
City Of Dallas, Texas
Sam A. Lindsay
City Attorney
Counsel of Record
Francisco Javier Garza
Assistant City Attorney
City Hall, 7D North
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3519

Attorneys for Respondent

MOTION FILED
MAR - 1 1994

No. 93-1250

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and Others Similarly Situated,
Petitioners,

VS.

THE CITY OF DALLAS,
Respondent.

ADVOCACY, INCORPORATED, ASSOCIATION FOR EDUCATION AND REHABILITATION OF THE BLIND AND VISUALLY IMPAIRED, BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS COUNCIL, EPILEPSY FOUNDATION OF AMERICA, NATIONAL ALLIANCE FOR MENTALLY ILL, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND PARALYZED VETERANS OF AMERICA

MOTION TO FILE BRIEF AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE ADVOCACY, INCORPORATED ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DISABILITY RIGHTS EDUCATION AND
DEFENSE FUND, INC. (DREDF)
ARLENE BRYNNE MAYERSON*
BRAD SELIGMAN
2212 Sixth Street
Berkeley, CA 94710
(510) 644-2555

* *Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

No. 93-1250

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and Others Similarly Situated,
Petitioners,

VS.

THE CITY OF DALLAS,
Respondent.

ADVOCACY, INCORPORATED, ASSOCIATION FOR EDUCATION AND REHABILITATION OF THE BLIND AND VISUALLY IMPAIRED, BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS COUNCIL, EPILEPSY FOUNDATION OF AMERICA, NATIONAL ALLIANCE FOR MENTALLY ILL, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND PARALYZED VETERANS OF AMERICA

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amici, Advocacy, Incorporated, et. al. are organizations which serve and represent people with disabilities who have a direct interest in the issues involved in this case. Pursuant to Rule 37.4 Amici respectfully move this Court for an Order granting leave to file the attached amicus curiae brief in support of the petition for writ of certiorari which provides further analysis of the two key concepts in disability rights laws, "individual with a disability," and "qualified individual with a disability" and which addresses the impact of the Fifth Circuit's denial of class actions in this type of case. Consent of attorneys for Petitioners has been obtained. Consent of attorneys for Respondent has been refused.

INTEREST OF AMICI

Amici Advocacy, Incorporated et al. are national and state service, advocacy, and professional organizations that serve citizens with a variety of disabilities. All of the disabilities represented share a common history of enduring prejudice, fear, stigma, myth, animus, and recalcitrant stereotypes that affect persons with disabilities in all aspects of life, especially employment. Each Amici draws upon a wealth of direct and practical experience with the types of blanket exclusion involved in this case. Amici have seen the waste of human potential, the economic consequences to people with disabilities and their families and the devastating assault to dignity that result from denying people who are able to work the opportunity to do so.

Amici know that the Fifth Circuit's decision threatens the principle of full inclusion of persons with disabilities and the protections afforded by Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. Amici lament the irony created by the Fifth Circuit's decision, that the advancements in medical treatment that would allow people to become more integrated into the mainstream of society, would actually result in stripping them of the civil rights protections of the law. Amici exhort the Court to recognize that blanket exclusions from employment based not on reasoned medical judgment, but on stereotypes, myths and fear, and the denial of class action remedies, would strike a punishing blow to the forty-three million people with disabilities whom Congress sought to protect. Amici, therefore submit the following brief in support of petitioner.

National and State Membership, Service and Advocacy Organizations

Amicus Advocacy, Incorporated, a non-profit legal advocacy group created and funded by the State of Texas pursuant to federal mandate, provides both statewide education and legal advocacy on behalf of persons with mental and physical disabilities.

Amicus Association for Education and Rehabilitation of the Blind and Visually Impaired, comprised of roughly 5,000 members throughout the United States and Canada, is the only international membership organization composed primarily of professionals who work with blind and visually impaired children and adults.

Amicus Bazelon Center for Mental Health Law, formerly the Mental Health Law Project, is a privately-funded, public interest

law firm dedicated to advocating for the rights of adults and children with mental disabilities, through litigation, administrative advocacy, education and technical assistance.

Amicus Disability Rights Council of Greater Washington, represented by the Washington Lawyers Committee for Civil Rights and Urban Affairs and leading Washington law firms on a pro bono basis, was organized by Washington, D.C. attorneys dedicated to enforcing the Americans with Disability Act and related laws on behalf of persons with disabilities and has actively worked against employment discrimination.

Amicus Epilepsy Foundation of America is a non-profit corporation founded in 1968 which advances the interests of over two million Americans with epilepsy through research, employment programs, public information and education, professional awareness, and advocacy.

Amicus National Alliance For Mentally Ill, with over one thousand local affiliates and 140,000 members, is a national grass roots organization which advocates for the rights of persons with mental illness to equal access in employment, housing, and other aspects of community life.

Amicus National Association of Protection and Advocacy Systems provides technical assistance and training in disability rights law, and it acts as a liaison between the nationwide protection and advocacy systems authorized under federal statutes and the federal executive and legislative branches.

Amicus National Employment Lawyers Association, comprised of 1,700 members who regularly handle cases of discrimination, represents a large segment of the leaders of the bar that specialize in employment discrimination law.

Amicus Paralyzed Veterans of America is a Congressionally created Veterans Service Organization, with roughly 15,000 members with disabilities resulting from injury or disease of the spinal cord, and advocates for the full enforcement of all laws affecting people with disabilities.

Respectfully submitted,

By ARLENE BRYNNE MAYERSON*
BRAD SELIGMAN
Counsel to Amici Curiae,
Advocacy, Inc., et al.

Dated: March 1, 1994

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i-v
INTRODUCTION/SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE FIFTH CIRCUIT'S HOLDING THAT PETITIONERS WERE NOT "REGARDED AS" HANDICAPPED WITHIN THE MEANING OF SECTION 504 IS CONTRARY TO DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND FEDERAL REGULATIONS AND FRUSTRATES CONGRESSIONAL INTENT	4
II. THE FIFTH CIRCUIT'S FAILURE TO CONDUCT AN INDIVIDUALIZED INQUIRY INTO THE ABILITY OF PETITIONERS TO DO THEIR JOBS, INCLUDING DRIVING, IS CONTRARY TO DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND CONGRESSIONAL INTENT	9
III. THE FIFTH CIRCUIT'S CATEGORICAL DENIAL OF CLASS TREATMENT IN SECTION 504 CASES IS INCONSISTENT WITH THE REHABILITATION ACT AND THE DECISIONS OF THIS COURT	14
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

Page

Andre H. v. Ambach, 104 F.R.D. 606 (SDNY 1985) 17
Alexander v. Choate, 469 U.S. 287 (1985) 16
American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 18
Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir. 1982) 11
Chalk v. U.S. District Court for the Central District of California, 840 F.2d 701 (9th Cir. 1988) 12
Chandler v. City of Dallas, 958 F.2d 85 (5th Cir. 1992) .. 16
Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), reh'g den'd, 9 F.3d 105 (1993) 1, 4, 15
Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) 2, 3, 9, 15
Cook v. State of Rhode Island, 10 F.3d 17,(1st Cir. 1993) 6, 10
Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984) ... 17, 18
Doe v. Attorney General of the United States, 941 F.2d 780 (9th Cir. 1991) 12
Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1989) 10
E.E. Black v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980) 7
Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) 6, 7
General Telephone Co. v. Falcon, 457 U.S. 147 (1982) ... 14
Griggs v. Duke Power Company, 401 U.S. 424 (1971) ... 12, 16
Guardians Ass'n v. Civil Service Com'n of City of New York, 463 U.S. 582 (1983) 15
Hall v. United States Postal Service, 857 F.2d 1073 (6th Cir. 1988) 10
Hills v. Gautreaux, 425 U.S. 284 (1976) 15
Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985) 6, 7
Jefferson v. Hackney, 406 U.S. 535 (1972) 15

Table of Authorities

Cases—Continued

Page

Jenkins v. Raymark Industries, Inc., 782 F.2d 468 (5th Cir. 1986) 18

Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353 (1985) 3, 13

Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982) 16

Kohl by Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989) 10

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) 12

Martinez v. School Board of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988) 10

New Mexico Association of Retarded Citizens v. State of New Mexico, 678 F.2d 847 (10th Cir. 1982) 16

New York State Association of Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979) 10, 16

Pandazides v. Virginia Board of Education, 946 F.2d 345 (4th Cir. 1991) 10

Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 6

Roncker v. Walter, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983) 16, 17

School Board of Nassau County v. Arline, 480 U.S. 273 (1986) .....*passim*

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 4, 11

Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983) 10, 11, 16

Taylor v. U.S. Postal Service, 946 F.2d 1214 (6th Cir. 1991) 6

Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989) 6

Woods v. Omaha School District, 985 F.2d 437 (8th Cir. 1993) 13

Yaris v. Special School District of St. Louis County, 780 F.2d 724 (8th Cir 1986) 16

Table of Authorities

Statutes, Regulations and Rules

Page

29 U.S.C. § 701 et seq. (Rehabilitation Act) 13, 4
42 U.S.C. § 12101 et seq. (Americans with Disabilities Act) 2
42 U.S.C. § 12134 2
49 App U.S.C.A. § 2503 12
49 App. U.S.C.A. § 2505 13
29 C.F.R. § 1630 (1993) 4, 5, 9
29 C.F.R. § 32 (1993) 12
45 C.F.R. § 84 (1985) 4
49 C.F.R. § 390 (1992) 12
55 Fed. Reg. 4102 (1990) 14
57 Fed. Reg. 10295 (1992) 13
58 Fed. Reg. 40690 (1993) 13
58 Fed. Reg. 40693 (1993) 13
Fed. R. Civ. P. 23(b)(2) 15, 16

Legislative History

S. Rep. No. 424, 98th Congress (1984) 3, 13
S. Rep. No. 1297, 93rd Congress (1974) 4
H. Rep. No. 485 (III), 101st Congress, 2nd Session (1990) 5, 9

Books and Publications

Federal Highway Administration, *Monitoring Drivers of Commercial Motor Vehicles Who Receive Vision Waivers*, December 9, 1993 14

No. 93-1250

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and Others Similarly Situated,
Petitioners,

VS.

THE CITY OF DALLAS,
Respondent.

ADVOCACY, INCORPORATED, ASSOCIATION FOR EDUCATION AND REHABILITATION OF THE BLIND AND VISUALLY IMPAIRED, BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS COUNCIL, EPILEPSY FOUNDATION OF AMERICA, NATIONAL ALLIANCE FOR MENTALLY ILL, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND PARALYZED VETERANS OF AMERICA

BRIEF OF AMICUS CURIAE ADVOCACY, INCORPORATED ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION/SUMMARY OF THE ARGUMENT

In this case, *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), the Fifth Circuit violated the central principle of federal disability civil rights legislation — that individuals must be judged on merit, not disability status.[1] Contrary to Congressional intent

[1] While this case involves Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794, the issues are identical under the recently enacted Americans with Disabilities Act ("ADA") which incorporates the

that the definition of "individual with a disability" be broad,[2] the Fifth Circuit refused to confer coverage to individuals who were excluded from over 4,000 city jobs in 138 categories solely because of their physical impairments. At the same time, the court held that, even if they were covered, their impairments render them so unsafe as to make them unqualified, as a matter of law. The court reached this conclusion without considering any information about the individuals involved and in total disregard of the detailed findings of fact by the district court. By holding that petitioners are not disabled enough to be protected by Section 504 and yet are so disabled as to be per se unqualified, the court created an untenable legal standard that eviscerates the Act for millions of Americans whom Congress sought to protect. Further, by refusing to recognize class action relief in cases under Section 504, the Fifth Circuit defeated Congress' express intent that individuals aggrieved by disability discrimination have the same remedies as other civil rights claimants.[3]

The Fifth Circuit's restrictive interpretation of the definition of disability defeats Congress' intention that individuals like petitioners have the opportunity to challenge adverse decisions which are based on their physical impairments. There is perhaps no stereotype about people with disabilities that is more pervasive and more harmful than the assumption that people with disabilities present safety risks. In order to ensure that decisions are not based on stereotypes, Section 504 "is carefully structured to replace reflexive reactions to actual or perceived handicaps with actions based on reasoned, sound medical judgments. . . ."[4] To prevent employers from unjustifiably excluding people with disabilities from the workforce, this Court required an individualized

---

Section 504 definitions involved in this case. In fact, Title II of the ADA, which covers state and local government entities, like Dallas, simply incorporates the rights, remedies and procedures of Section 504, 42 U.S.C. § 12132, and mandates that regulations promulgated to implement Title II be consistent with the Section 504 regulations. 42 U.S.C. § 12134(b).

[2] *Nassau County School Bd. v. Arline*, 480 U.S. 273, 285 (1987).

[3] *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 625 (1984), citing 29 U.S.C. § 794a(a)(2).

[4] *Arline*, 480 U.S. at 285.

bilities from the workforce, this Court required an individualized inquiry into the physical capabilities and safety risks posed by the person seeking the Act's protection.[5]

Far from the individualized inquiry required by *Arline*, the Fifth Circuit upheld the City's use of blanket exclusions developed by the U.S. Department of Transportation (DOT) for entirely different purposes. As this Court admonished in *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985), a federal regulation cannot be adopted and used to defend a claim of discrimination unless there is a congruity of purpose which justifies the application of the federal standard. Neither the City in adopting, nor the Fifth Circuit in upholding the exclusionary criteria even attempted to show a reasoned or medically sound justification for the application of federal standards designed for interstate driving of commercial vehicles to city driving of non-commercial vehicles. Nor would it have been possible to show a congruity of purpose given that Congress' intent not to extend the standards to the type of driving involved in this case was express.[6]

By upholding a blanket exclusion based on disability under the rubric of safety without requiring any substantiation of the standards used and without regard to the proven track record of the petitioners, the Fifth Circuit has left millions of disabled Americans vulnerable to exactly the type of discrimination Congress sought to prevent in enacting Section 504 and the Americans with Disabilities Act. Petitioners, and all those with excluded disabilities, carry a stigma of dangerousness and hazardousness and are foreclosed from the job opportunities Congress sought to promote.[7]

---

[5] *Id.* at 287.

[6] S. Rep. No. 424, 98th Congress (1984). Department of Transportation regulations and their proper application are discussed, *infra*. Because this case implicates the Section 504, ADA and Department of Transportation regulations, amici request that the Court ask the Government for its views.

[7] As this Court stated in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634, the remedial purpose of the Rehabilitation Act is to "promote and expand employment opportunities" for the handicapped. 29 U.S.C. § 701(8).

ARGUMENT

I. THE FIFTH CIRCUIT'S HOLDING THAT PETITIONERS WERE NOT "REGARDED AS" HANDICAPPED WITHIN THE MEANING OF SECTION 504 IS CONTRARY TO DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND FEDERAL REGULATIONS AND FRUSTRATES CONGRESSIONAL INTENT.[8]

In *Arline, supra*, this Court stated that in order "[t]o combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of 'handicapped individual' so as to preclude discrimination against '[a] person who has a record of, or is regarded as having an impairment [but who] may at present have no actual incapacity at all.' "[9] Congress recognized that individuals with physical impairments that are not substantially limiting and therefore may not fall under the first prong of the definition are subjected to discrimination.[10] Thus, the Court concluded that Congress added the "regarded as" prong to the definition of "handicapped individual" because "society's accumulated myths and fears about disa-

---

[8] Amici agree with petitioner that Chandler should have been covered under the first prong of the "handicap" definition — substantially limited in a major life activity. 29 U.S.C. § 706(7)(B). *See* Petitioners' Brief, p.18. The Fifth Circuit mistakenly stated that the Dept. of Health and Human Services (formerly HEW) regulations do not expressly discuss diabetes. *Chandler*, 2 F.3d at 1391. However, as this Court noted in *Arline*, HEW did give examples of disabilities that would be covered, including diabetes. *Arline*, 480 US. at 280 n.5, citing 45 C.F.R. 84, Appendix A, p. 310 (1985).

Moreover, the Fifth Circuit's refusal to accept the regulations of the EEOC implementing the Americans with Disabilities Act which state that diabetes requiring insulin for control is covered by the first prong of the definition of disability is particularly inappropriate given that in the ADA, "Congress adopted the definition of [disability] from the Rehabilitation Act." 29 C.F.R § 1630.2(g), App. 402.

[9] *Arline*, 480 U.S. at 279, citing *Southeastern Community College v. Davis*, 442 U.S. 397, 405-406, n. 6 (1979).

[10] *Id.*, citing S. Rep. No. 1297, p. 39, 93rd Congress (1974).

bility and disease are as handicapping as are the physical limitations that flow from actual impairment."[11]

The Court's warning is particularly pertinent in this case because diabetes and impaired vision have historically been considered hazardous disabilities. In this case, the City of Dallas engaged in precisely the sort of discriminatory conduct that Congress sought to prevent when it amended Section 504. The City regarded the petitioners as disabled by concluding that they had impairments which were substantial enough to prevent them from driving safely. More generally, the City's characterization of petitioners as unable to drive implicates their ability to perform a wide myriad of jobs where safety is an issue. The City's perception of Chandler and Maddox as being "unsafe" because of their impairments is exactly the type of myth, fear and stereotype which has limited the opportunities of people with disabilities historically.[12] It is because of the discrimination that results from these fears that Congress expanded the definition of "handicapped individual" to cover the type of situation presented here.[13]

---

[11] *Id.* at 284.

[12] The EEOC, the agency charged with implementing the employment provisions of the ADA, has honed in on the "substantially limited in working" part of the definition of individual with a disability. Following language in the Judiciary Report, H. Rep. No. 485 part 3, 101st Cong., 2nd Session, 30-31 (1990), the EEOC Commentary to its regulations provides that:

> An individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability [regarded as], whether or not the employer's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding . . . safety . . . 29 C.F.R. § 1630, App. 406 (1993).

[13] *Arline*, 480 U.S. at 284. (Basic to purpose of Section 504 is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.)

The Fifth Circuit's restrictive interpretation of the "regarded as" prong of the definition also cannot be reconciled with decisions rendered by other appellate courts,[14] including the appellate decisions which it cites as supporting authority. The Fifth Circuit ruled that in order to establish that an employer perceived them as handicapped the plaintiffs were required to show that they were considered incapable of performing work related functions in general.

As support for this proposition, the Fifth Circuit cited *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), and *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985). Neither case would condone the sweeping holding of the Fifth Circuit in this case. In *Forrisi*, the Fourth Circuit rejected coverage for the plaintiff who had acrophobia and was unable to climb ladders or stairs to certain heights because "[f]ar from being regarded as having a "substantial limitation in employability, [the plaintiff] was seen as unsuited for one position in one plant — and nothing more."[15]

In *Jasany* the Sixth Circuit ruled that a postal worker with a mild case of strabismus (crossed eyes) was not "handicapped" because his condition did not affect him in any way other than the ability to operate a particular mail sorting machine. The court did not even address the third prong of the definition — regarded as having a handicap. Moreover, in the Sixth Circuit's more recent decision in *Taylor v. U.S. Postal Service*, 946 F.2d 1214, 1218

---

[14] *See, Taylor v. U.S. Postal Service*, 946 F.2d 1214 (6th Cir. 1991) (a person with a degenerative bone condition in his back and knees was perceived as handicapped because the Post Office believed that he was incapable of safely performing the job of distribution clerk); *Cook v. State of Rhode Island*, 10 F.3d 17, (1st Cir. 1993) (it is not necessary for an employee to show that her impairment would prevent her from doing a broad range or number of jobs); *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989) (the Army Corps of Engineers refused to hire the plaintiff because X-rays revealed a congenital spinal deformity, despite the fact that the Corps' doctors concluded that this deformity would not limit the plaintiff's ability to lift weights). *See also, Reynolds v. Brock*, 815 F.2d 571, 573 (9th Cir. 1987) (a plaintiff need not prove that she is incapable of doing her job to prove that she is "handicapped.")

[15] *Forrisi*, 794 F.2d at 935.

(6th Cir. 1991), the court emphasized the Supreme Court's admonition in *Arline* that the Act's definition of handicap is broad.

In *Chandler*, the Fifth Circuit held that the City of Dallas did not regard the petitioners as handicapped even though its exclusionary rule barred them from performing *138* different job classifications involving approximately *4,000* job positions.[16] Petitioners were not barred from a single job, or a narrow range of jobs, as were the plaintiffs in *Forrisi* and *Jasany*.[17] The Fifth Circuit has expanded the rule contained in *Forrisi* and *Jasany* so far as to posit a new, and completely different, proposition, i.e., that as long as an employer regards an employee as incapable of performing a single job task, the employer may exclude the employee from a massive range of job types and job positions without challenge because those affected do not qualify for coverage under the regarded as prong of Section 504.[18]

---

[16] Petitioners' Appendix B, p. 64a.

[17] Moreover, in *Forrisi* and *Jasany*, the impairments did actually affect job performance. Rather than perceiving the plaintiffs as "handicapped," the employer found that the impairments prevented performance of job-functions. In this case, the employer's standards did not relate to the ability to do the job. Petitioners were excluded for the sole reason that they have impairments, the classic case for Section 504 "regarded as" coverage.

[18] Moreover, in both *Forrisi* and *Jasany*, the courts relied on *E.E. Black v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980), which the Sixth Circuit described as the most comprehensive examination of the "substantially limited in working" issue. *Jasany*, 755 F.2d at 1248. In that case, the court emphasized that the exclusionary policy of defendant employer must be ascribed to all employers offering the same or similar jobs when evaluating whether the policy has a substantial impact on employment. Without this presumption of general usage, an employer would be rewarded for coming up with stringent and esoteric exclusionary criteria.

Employing the presumption in this case, it is clear that the exclusionary policy would have a profound effect on Petitioners' job opportunities. If all employers assumed that Petitioners were incapable of holding jobs which involved driving because of their impairments, Petitioners would be significantly curtailed in employment. If all employers assumed that Petitioners' disabilities rendered them unsafe generally, the limitation on employment opportunities would be even more dramatic.

Finally, it is important to understand that the Fifth Circuit's decision in *Chandler* is internally inconsistent, creating a never-ending Catch-22 for individuals such as petitioners whose impairments do not interfere with their jobs but who are discriminated against none the less. By endorsing the City's exclusion of petitioners because of the perception that their disabilities were so severe that they were not able to do their jobs safely, and at the same time concluding that petitioners were not disabled, the Fifth Circuit has taken inherently contradictory positions. In essence, the Fifth Circuit claims that petitioners were too disabled to do their jobs, yet were not disabled enough to be covered as people with disabilities under Section 504. This position simply does not make sense. The dangers of adopting this position are made clear by this case. In this case, the City of Dallas referred to the petitioners as disabled in order to satisfy federal affirmative action requirements,[19] excluded the petitioners from employment opportunities because of their impairments, and then subsequently argued in court that petitioners were not disabled within the meaning of Section 504. By refusing to find that petitioners were "regarded as" handicapped under these circumstances, the Fifth Circuit has undermined the central purpose of Section 504, as described in *Arline*:

> Such exclusion [from coverage] would mean that those accused of being [unsafe] would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they are 'otherwise qualified.' Rather they would be vulnerable to discrimination on the basis of mythology — precisely the type of injury Congress sought to prevent.[20]

---

[19] Petitioners' Appendix B, p. 32a.

[20] *Arline*, 480 U.S. at 285.

II. THE FIFTH CIRCUIT'S FAILURE TO CONDUCT AN INDIVIDUALIZED INQUIRY INTO THE ABILITY OF PETITIONERS TO DO THEIR JOBS, INCLUDING DRIVING, IS CONTRARY TO DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND CONGRESSIONAL INTENT.

The Supreme Court has stated that the primary purpose of Section 504 of the Rehabilitation Act of 1973 was to increase employment opportunities for people with disabilities.[21] To ensure that people with disabilities are not excluded from employment because of misconceptions or stereotypes about disability, this Court has required that employers act on the basis of accurate information about a individual's physical or mental abilities, rather than on the basis of uninformed generalizations as in this case.

As the Court wrote in *Arline*, "[t]he Act is carefully structured to replace [ ] reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments . . . ."[22] This Court reasoned that "[an individualized inquiry] is essential if Section 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[23]

In this case, the Fifth Circuit has upheld precisely the type of conduct that this Court condemned in *Arline*. In *Arline*, this Court required an individualized inquiry into the safety risks posed by the classroom presence of a woman with record of tuberculosis. If the Fifth Circuit's decision were correct, the defendant in *Arline* could have avoided performing an individualized inquiry merely by adopting a blanket rule that *no* person with

---

[21] *Consolidated Rail Corp. v. Darrone*, 465 U.S. at 634.

[22] *Arline*, 480 U.S. at 285. Decisions must be based on reasonable medical judgments about the nature of the safety risk, the duration of the risk, the severity of the risk and the probability that the injury will occur. *Id.* at 288; 29 C.F.R. § 1630, App. 406, 410 (1993); *see also* H. Rep. No. 485, part 3, 101 Congress 2nd Sess. at 34 (1990).

[23] *Arline*, 480 U.S. at 287.

tuberculosis or a history of tuberculosis could teach in the classroom because there was some unquantifiable safety risk associated with the impairment. The Fifth Circuit's decision would allow employers to exclude people with disabilities on the basis of an employer's assertion that an individual's disability posed a safety risk, no matter how closely the rule fit the physical qualifications necessary to perform the essential functions of the job, and no matter what the actual physical abilities of the individual in question.[24]

The Fifth Circuit's refusal to conduct an individualized inquiry into the risks posed by a particular person with a disability is also in direct conflict with decisions rendered by other appellate courts.[25] *Strathie v. Department of Transportation,* 716 F.2d 227

---

[24] Because the Fifth Circuit held that petitioners were not qualified as a matter of law, it disregarded the individualized inquiry conducted by the trial court. It is ironic that at the time of trial and appeal, both plaintiffs *were* driving in their jobs for the City of Dallas. Moreover, a waiver process had already been established to the diabetes standard and Chandler had already qualified for the waiver because he posed "no increased risk." Petitioners' Appendix B, p. 44a.

[25] In addition to the Circuit Court opinions discussed in the text, *See Hall v. United States Postal Service,* 857 F.2d 1073, 1079 (6th Cir. 1988) (requiring individualized inquiry into risks posed by plaintiff who was unable to lift heavy weights without risk to her own health); *Doherty v. Southern College of Optometry,* 862 F.2d 570, 574 (6th Cir. 1989) (determination of whether plaintiff is otherwise qualified must be decided as an issue of fact); *Martinez v. School Board of Hillsborough County,* 861 F.2d 1502, 1505 (11th Cir. 1988) (Section 504 required an individualized assessment of the risks posed by child with AIDS in classroom); *Kohl by Kohl v. Woodhaven Learning Center,* 865 F.2d 930, 936 (8th Cir. 1989) (individualized inquiry required before excluding a child with hepatitis B from a rehabilitation residence); *New York State Association of Retarded Children v. Carey,* 612 F.2d 644, 650 (2d Cir. 1979) (segregation of carriers of hepatitis B in the New York schools violated Section 504, based on detailed inquiry into the risks posed by children who were carriers). *See also, Pandazides v. Virginia Board of Education,* 946 F.2d 345 (4th Cir. 1991) (individualized inquiry was necessary to determine qualifications for teaching job); *Cook v. State of Rhode Island,* 10 F.3d 17, (1st Cir. 1993) (individualized inquiry into the plaintiff's physical abilities required).

(3d Cir. 1983), is the leading case concerning driving safety and disability employment discrimination.[26] In *Strathie*, the Third Circuit heard a challenge to a Pennsylvania state Department of Transportation rule which excluded people with hearing impairments from jobs as school bus drivers. The Third Circuit held that Section 504 mandated that the district court consider whether the plaintiffs would be able to drive safely if they were provided with reasonable accommodations such as a periodic inspection of hearing aids to ensure proper functioning. With regard to each possible accommodation, the court required a fact-specific inquiry into the safety risks that would be posed. This is precisely the type of individualized inquiry that the Supreme Court later commanded in *Arline, supra.*

The Ninth Circuit has consistently ruled that courts must conduct an individualized inquiry into the specific risks posed by a particular employee, including employees with diabetes. In *Bentivegna v. U.S. Department of Labor,* 694 F.2d 619, 621 (9th Cir. 1982), the Ninth Circuit struck down a blanket rule barring all applicants with diabetes mellitus that was not in "control," meaning blood sugar levels below a certain level.[27] The Ninth Circuit, relying on this Court's decision in *Southeastern Community College v. Davis,* 442 U.S. 397, 406 (1979), concluded that the City could not "discriminate by establishing restrictive 'program requirements' where it could not so discriminate in making individual employment decisions."[28] Therefore, "[b]lanket requirements must . . . be subject to the same rigorous scrutiny as any individual decision denying employment to a handicapped person."[29] The Court underscored that "[t]he importance of

---

[26] Citing *Strathie*, this Court in *Arline* stated that the approach taken to assess the risks posed by an individual with a contagious disease was "consistent with that taken by courts that have addressed the question whether the Act covers persons suffering from conditions other than contagious diseases that render them a threat to the safety of others." *Arline*, 480 U.S. at 285.

[27] In *Chandler*, even those whose diabetes was "controlled" were excluded from a broad range of jobs.

[28] *Bentivegna*, 694 F.2d at 621.

[29] *Id.*

preserving job opportunities for the handicapped sets a high standard for the effectiveness of job qualifications that adversely affect the handicapped."[30] The Court required the City to demonstrate that its qualification standards were "directly connected with" and "substantially promote" safe performance.[31]

In this case, the City of Dallas cannot demonstrate that it relied on "reasoned and medically sound judgments" or that the physical criteria were "job-related" or "directly connected with" safe performance.[32] The City made no attempt to fashion a rule which would address its safety concerns. Rather, the City of Dallas merely imposed a U.S. Department of Transportation rule which was designed for a different purpose,[33] *interstate* driving of *commercial vehicles*.[34] In this case, the petitioners were driving non-

---

[30] *Id.*

[31] *Id.* at 622; *see also, Chalk v. U.S. District Court for the Central District of California*, 840 F.2d 701, 705 (9th Cir. 1988) (a teacher with AIDS cannot be barred from teaching without an individualized inquiry into the safety risks posed); *see Doe v. Attorney General of the United States*, 941 F.2d 780, 798 (9th Cir. 1991) (individualized inquiry necessary to determine whether employee with AIDs would pose substantial risk); *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985) ("[a]n employer must gather all relevant information regarding the applicant s work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job.")

[32] Petitioners' Appendix B, p. 30a-31a. The job-related standard in Section 504 is modelled after and consistent with other civil rights statutes. *See* 45 C.F.R. 84.13 App. A, p. 383 (1993) (citing *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); 29 C.F.R. § 32.14 (1993)).

[33] Moreover, the Department of Transportation has admitted that the DOT rule itself is medically unsubstantiated even for the purpose for which it was designed, and has instituted waiver programs from both the vision and diabetes standard. *See* discussion, *infra*.

[34] A commercial motor vehicle is "any self-propelled or towed vehicle used on the public highways in interstate commerce to transport passengers or property that exceeds 10,000 pounds, is designed to carry 15 or more passengers, or transports hazardous materials in quantities subject to placarding." 49 U.S.C. App. § 2503; 49 C.F.R. § 390.5.

commercial vehicles within the City of Dallas. Congress expressly deferred to state automobile licensing for the types of vehicles operated by petitioners.[35] This Court has warned against such wholesale reliance on a federal standard to defend a discrimination claim by city employees.[36]

In its review of the Department of Transportation regulations, the Fifth Circuit completely ignored the fact that the Department itself has recognized the importance of establishing waiver programs which determine qualifications based on individualized assessments even for drivers who *are* driving commercial vehicles. DOT has expressly stated that these waivers are necessary in order "to provide maximum employment opportunities for those persons covered by the Americans with Disabilities Act and the Rehabilitation Act of 1973."[37] Moreover, in instituting the waiver programs, DOT admitted that there is a "lack of empirical evidence on which to base clearly defensible . . . standards."[38]

---

[35] The relevant Senate Report states:

> The 10,000-pound limit, which is in the current BCS regulations, is proposed to *focus* enforcement efforts and *because small vans and pickup trucks are more analogous to automobiles than to medium and heavy commercial vehicles, and can best be regulated under State automobile licensing, inspection, and traffic surveillance procedures.*
>
> S. Rep. No. 424, 98th Congress (1984)

Moreover, even if petitioners *were* driving commercial vehicles, they would still be eligible to drive within the city because the statute explicitly allows for licensing in such circumstances 49 App. U.S.C.A. § 2505(h). Both petitioners had valid drivers licenses from the State of Texas.

[36] *Johnson v. Mayor & Council of Baltimore*, 472 U.S. 353 (1985) (adoption of federal mandatory retirement age for the city's firefighters is not a defense to claim of discrimination, as a matter of law).

[37] 57 Fed. Reg. 10295 (March 25, 1992) (vision waiver); *See also*, 58 Fed. Reg. 40693 (July 29th, 1993) (diabetes waiver).

[38] 57 Fed. Reg. 10295; See also, 58 Fed. Reg. 40690. These statements contradict the Fifth Circuit's reliance on an earlier statement in 1970 by the Director of the FHWA that the risks are "so well known." *Chandler*, 3 F.2d at 1394-5. Furthermore, as pointed out by the Eighth Circuit in *Woods v. Omaha School District*, 985 F.2d 437 (8th Cir.

Hence, while it is questionable whether the DOT rule could be used for the purposes for which it was designed, it certainly cannot meet the standards established by this Court and other Circuits to justify a rule which excludes all individuals with petitioner's disabilities from driving as a part of their city jobs. At a minimum, Section 504 requires individual assessments of risks, based on the medical, work and driving records of the individuals with the excluded impairments.

III. THE FIFTH CIRCUIT'S CATEGORICAL DENIAL OF CLASS TREATMENT IN SECTION 504 CASES IS INCONSISTENT WITH THE REHABILITATION ACT AND DECISIONS OF THIS COURT.

Creating another Catch-22, the Fifth Circuit allowed the City to exclude classes of individuals from jobs based on disability status, and at the same time refused to allow a class challenge to this practice. By stripping those individuals affected by the blanket exclusions of class relief, the Fifth Circuit departs from established class action principles and practices, the federal agency's Section 504 regulations and Congress' intent that Section 504 claimants have the same remedies as other civil rights plaintiffs.

Despite this Court's admonition that courts should subject class allegations to "rigorous analysis,"[39] the Fifth Circuit in two paragraphs held that class treatment was inappropriate in a Section 504 case because "the determinations of whether an

---

1993), a case cited by the Fifth Circuit, as early as 1990, DOT had recognized that a "case-by-case assessments of insulin-using individual's abilities to safely operate nonpassenger-carrying commercial vehicles in interstate commerce is possible." 55 Fed. Reg. 4102 (1990).

Moreover, far from being the per se safety risks assumed by the Fifth Circuit, based on preliminary data recently made available as a result of the DOT Vision Waiver program, it appears that those low vision drivers who but for the waiver would not be allowed to drive interstate commercial vehicles under current DOT standards, are safer drivers than their non-vision impaired counterparts. *See, Federal Highway Administration, Monitoring Drivers of Commercial Motor Vehicles Who Receive Vision Waivers,* December 9, 1993.

[39] *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982).

individual is 'handicapped' or 'otherwise qualified' are necessarily individualized inquiries."[40]

The Fifth Circuit ignored the fact that all civil rights class actions require issues of proof regarding class membership and qualifications.[41] As the district court recognized, this case is appropriate for class relief because "[t]he party has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23 (b)(2).[42]

Nothing in the Rehabilitation Act or its basic implementing regulations suggests that class treatment is unavailable in Section 504 cases. To the contrary, both the statute and the regulations make it clear that Congress intended Section 504 claimants to have the same remedies as others alleging violations of their civil rights.

As this Court has explained, the 1978 amendments to the Act incorporated the "remedies, procedures and rights" set forth in Title VI of the Civil Rights Act of 1964.[43] Class actions have long been a staple of Title VI.[44] Likewise, this Court and all other

---

[40] *Chandler*, 3 F.2d at 1396.

[41] *See* discussion, *infra*.

[42] Petitioners' Appendix B, p. 55a-56a. Rule 23 does not require that all issues be common or identical to the class — instead it requires that "questions of law or fact" be common to the class. Fed. R. Civ. P. 23(a).

[43] *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 625 (1984), *citing* 29 U.S.C. 794a(a)(2). *See also, School Board of Nassau County v. Arline*, 480 U.S. 273, 278 n.2 (1986) (noting "Congress' decision to pattern § 504 after Title VI").

[44] *See, e.g., Evans v. Jeff D.*, 475 U.S. 717 (1982); *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582 (1983); *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

Circuits have accepted class challenges under a wide myriad of Section 504 cases.[45]

Moreover, the Rehabilitation Act regulations, which this Court has endorsed as "an important source of guidance on the meaning of Section 504,"[46] specifically contemplate class action lawsuits, based on civil rights law precedents. The regulations concerning employment criteria, like those in this case, explicitly adopt class action analysis. Thus, the regulations prohibit the use of any "employment test or other selection criterion that screens out or tends to screen out handicapped persons *or any class of handicapped persons* unless . . ." the test is shown to be job related and alternative job related tests without such an effect are not available.[47]

This action was certified solely under Federal Rule of Civil Procedure 23(b)(2) and solely for purposes of injunctive relief. The remedy ordered was injunctive relief requiring the City to make individual determinations regarding the ability of class members to perform the jobs in question, rather than relying solely on its sweeping employment standards.[48] Under this approach, the District Court was not required to make any individual determinations concerning class members. Indeed, the nature

---

[45] *See, e.g., Alexander v. Choate*, 469 U.S. 287 (1985); *Strathie v. Department of Transportation, supra; New York State Assn. for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979); *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982); *New Mexico Association of Retarded Citizens v. State of New Mexico*, 678 F.2d 847 (10th Cir. 1982); *Yaris v. Special School District of St. Louis County*, 780 F.2d 724 (8th Cir 1986). *See also, Roncker v. Walter*, 700 F.2d 1058, 1063-1064 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) (Education for All Handicapped Children Act's requirement of individualized placement decisions does not preclude class treatment).

[46] *Arline*, 480 U.S. at 279.

[47] 45 C.F.R. 84.13(a) (1992) (emphasis added). As explained in the Section by Section Analysis to the regulations, "[t]his paragraph is an application of the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)." 45 C.F.R. § 84.13 App. A, 383 (1992). *Griggs* was a class action which established the disparate impact theory of discrimination.

[48] *See, Chandler v. Dallas*, 958 F.2d 85, 87 (5th Cir 1992).

of the wrong was that the City adopted a policy that explicitly precluded the individual determinations required by Section 504.

The irony of the Fifth Circuit's holding is that it protects an employer from class actions particularly when it acts on a class basis. The common issues in this case are more central than those in other types of class cases where many individual issues could be involved, such as damage actions or fraud cases. Indeed, even absent a specific employment test or standard, this Court has held that where an employer has used a "biased testing procedure" or there was "significant proof" that an employer acted under a "general policy" of discrimination, common questions justified class certification even with a broad class of applicants and employees. The subclasses certified in this case are much narrower, and share more common issues than those endorsed by *Falcon*.[49]

In *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), an analogous case under the Education for All Handicapped Children Act of 1975, 20 U.S.C. 1401 *et seq.*, the Sixth Circuit has upheld class treatment despite that Act's requirement of individual placement determinations. In *Roncker*, as in this case, plaintiffs challenged a blanket policy which precluded individual determinations. "Such an allegation, if proven, would show a violation of the Act for the very reason that placements were not individually made."[50]

---

[49] *Falcon*, 475 U.S. 147, n.15. Even if this action had presented individual issues, it is well established that the presence of individual issues is not fatal to class treatment. Thus, even where each class member must individually prove damages — a situation far more individualized than that below — it is clear that class treatment is appropriate. *See* Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 103. Indeed, in most civil rights class actions, individualized determinations of class status and entitlement to damages are the norm, not the exception. *See, e.g., Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977).

[50] *Roncker*, 700 F.2d at 1064. *Accord, Andre H. v. Ambach*, 104 F.R.D. 606 (SDNY 1985).

Instead of reviewing the trial court's certification order under the abuse of discretion standard,[51] the Fifth Circuit adopted a radical and draconian rule which would deny plaintiffs with disabilities and the courts the benefits of class treatment afforded to all other protected classes. Instead of allowing the most effective and efficient means of litigating common and systemic issues, the Fifth Circuit would require each person affected by Dallas' employment standards to mount entirely independent actions.[52] The burden to plaintiffs and the courts is clear. The City of Dallas, having determined to act on a class basis, would enjoy immunity from a class adjudication. Such a result would undermine the goal of the Rehabilitation Act and invite other categorical exemptions from Rule 23, thus ultimately vitiating Rule 23 itself.

---

[51] *See, e.g., Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986).

[52] "Efficiency and economy of litigation" are the principal purposes of class action procedures. *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 553 (1974); *Falcon, supra*, at 159. Accordingly, the class device "was intended to establish a procedure for the adjudication of common questions of law or fact." *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 880 (1984). It is a medium for the "expeditious" determination of common questions. *Id.* at 881.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

DISABILITY RIGHTS EDUCATION & DEFENSE FUND

By ARLENE BRYNNE MAYERSON*
BRAD SELIGMAN
Counsel to Amici Curiae, Advocacy, Inc., et al.

Dated: March 1, 1994

* Counsel of Record

Counsel would like to acknowledge the assistance of law school graduate Guy Wallace and law student Robert Jon Hendricks, for their work in preparing this brief.

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

No. 93-1250

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX, and OTHERS SIMILARLY SITUATED, Petitioners,

v.

THE CITY OF DALLAS, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

Rick T. Haselton
Counsel of Record

HAGLUND & KIRTLEY
101 SW Main, Suite 1800
Portland, Oregon 97204
Telephone: (503) 225-0777

February 1994

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

STATEMENT OF THE CASE 6

REASONS FOR GRANTING WRIT 7

A. The Fifth Circuit's "Controlled Condition" Definition of "Handicap" Subverts the Rehabilitation Act and the Americans With Disabilities Act . . . 7

B. The Fifth Circuit's Categorical "Otherwise Qualified" Approach Sanctions Blanket Exclusions of Handicapped Workers 12

CONCLUSION 18

APPENDIX

TABLE OF AUTHORITIES

Cases:

Barth v. Gelb, 761 F. Supp. 830 (D.D.C. 1991), aff'd, 2 F.3d 1180 (D.C. Cir. 1993) 15, A-1

Bentivegna v. Department of Labor, 690 F.2d 619 (9th Cir. 1982) A-1

Brown v. County of Genesee, 37 Fair Empl. Prac. Cas. (BNA), 1595 (W.D. Mich. 1985) . . . A-2

Com. Department of Transport v. Tinsley, 564 A.2d 286 (Pa. Cmwlth. 1989) 14, A-3

Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), aff'd, without opinion, 865 F.2d 592 (3d Cir. 1989) 13, 14, A-2

Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), aff'd, without opinion, 865 F.2d 592 (3d Cir. 1989) A-2

Fraser Shipyards, Inc. v. DILHR, 13 Fair Emp. Prac. Cases 1809 (Wisc. Cir. Ct. 1976) 4

Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991) 9, 11

Jackson v. State, 544 A.2d 291 (Me. 1988), cert. denied, 491 U.S. 904 (1989) A-3

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) 16

Miller v. Sioux Gateway Fire Department, supra, 497 N.W.2d 838 (Iowa 1993) 15, A-3

Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 9, 11

School Board of Nassau County v. Arline, 480 U.S. 273 (1987) 6, 12, 13

Serrapica v. City of New York, 706 F. Supp. 64 (S.D.N.Y. 1989) 15, A-2

Wood v. Omaha School District, 785 F. Supp. 1441 (D. Neb. 1992), rev'd on other grounds, 985 F.2d 437 (8th Cir. 1993) . . . A-1

Statutes:

49 C.F.R. § 391.41(b) 17

58 Fed. Reg. 40690 (July 29, 1993) . 17

S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) . 8, 9

Miscellaneous:

American Diabetes Association, Direct and Indirect Costs of Diabetes in the United States in 1992 (1993) 2

Bayler, "Dulling A Needle: Analyzing Federal Employment Restrictions on People with Insulin-Dependent Diabetes," 67 Ind. L.J. 1067, 1078-81 . . . 10, 14

DCCT Research Group, "The Effect of Intensive Treatment of Diabetes on the Development and Progression of Long-term Complications in Insulin-dependent Diabetes Mellitus," N. Engl. J. Med. 1993; 329:977-86 14

29 CFR Part Appendix A, § 1630.2(h) . 8

29 CFR Part Appendix A, § 1630.2(r) . 16

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX, and OTHERS SIMILARLY SITUATED,
Petitioners,

v.

THE CITY OF DALLAS, Respondent.

BRIEF OF AMICUS CURIAE AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Diabetes Association is a nationwide, non-profit, voluntary health organization made up of persons with diabetes, health professionals, research scientists, and other concerned individuals. The ADA's mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.[1]

---

[1] Presently, there are over 13 million Americans with-diabetes, including some 2.8 million persons taking some insulin to help control their diabetes. In 1992 employee productivity

(continued...)

The ADA has 53 state affiliates and more than 800 chapters throughout the United States. With over 290,000 general members and over 10,000 medical professional members, the ADA is the nation's leading voluntary health organization addressing diabetes-related concerns.

Among the ADA's principal concerns is the fair treatment in employment of persons with diabetes. Since 1984, the ADA has advocated for the following policy concerning employment:

> Diabetes as such should not be a cause for discriminating against any person in employment. People with diabetes should be individually considered for employment, weighing such factors as the requirements or hazards of the specific job, and the individual's medical condition and treatment regimen (diet, oral hypoglycemic agents and

---

[1](...continued)
losses related to diabetes were $46.6 billion. American Diabetes Association, Direct and Indirect Costs of Diabetes in the United States in 1992 at 19 (1993).

> insulin). Any person with diabetes, whether insulin-dependent or non-insulin-dependent, should be eligible for any employment for which he or she is otherwise qualified.

Consistent with this policy, the ADA has appeared as amicus curiae in suits throughout the United States challenging restrictions on the employment of persons with diabetes.

This case is especially important to the ADA's members because the Fifth Circuit's "controlled condition" definition of "handicap" and the court's categorical "otherwise qualified" analysis vitally affect the interests of millions of Americans with diabetes. In particular, under the court of appeals' decision, individuals with insulin-dependent diabetes who successfully monitor and control their disease will be excluded from the protection of the Rehabilitation Act and its much broader corollary, the Americans With Disabilities Act. In addition, the court of appeals' decision sanctions blanket "as a matter of law" exclusions

of persons with diabetes from certain types of employment, particularly including jobs requiring driving.

The ADA respectfully urges this Court accept review and reverse the court of appeals.

SUMMARY OF ARGUMENT

This case presents the provocative issue of whether a person can be: (1) insufficiently impaired to be "handicapped," but (2) sufficiently impaired to be not "otherwise qualified," within the meaning of the Rehabilitation Act of 1973.

The Fifth Circuit reached this incongruous result with respect to petitioner Lyle Chandler, a person with insulin-dependent diabetes. That result, which subverts the policies of the Rehabilitation Act and its much broader corollary, the Americans with Disabilities Act, requires review and correction.

The court of appeals erred in two particulars whose significance

transcends the individual interests of the present parties:

First, the Fifth Circuit defined petitioner Chandler's handicap by reference to his controlled condition, rather than to his uncontrolled condition. In particular, the court relied upon Mr. Chandler's testimony that "he did not consider his diabetes to be a substantial limitation on his major life activities" (2 F.3d at 1391), without acknowledging the uncontroverted medical testimony that Mr. Chandler's insulin-dependent diabetes, if uncontrolled, would trigger reactions requiring hospitalization and could result in coma, and even death. See Tr. Vol. 19 at 6-7, 10-12.

This "controlled condition" definition of "handicap" violates the Rehabilitation Act's mandate. Indeed, the Fifth Circuit "handicap" analysis conflicts with all other reported cases under the Rehabilitation Act or its state equivalents involving plaintiffs with diabetes. Thus, review is imperative to

resolve a conflict in law. See pp. 7-12, infra.

Second, the court of appeals' "otherwise qualified" determination was categorical, not individualized. The court disregarded Mr. Chandler's particular circumstances, including his work history and his ability to control his disease. Instead, the court determined that "as a matter of law" all persons with insulin-dependent diabetes are not "otherwise qualified" for positions that require driving. 2 F.3d at 1395.

This categorical approach, "based on prejudice, stereotypes, and fear,"[2] subverts the principles of the Rehabilitation Act and the Americans with Disabilities Act. See pp. 12-18, infra.

STATEMENT OF THE CASE

Amicus curiae American Diabetes Association adopts petitioner's Statement of the Case.

---

[2] School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

Amicus curiae would emphasize the uncontroverted evidence, and the district court's corresponding findings of fact, that: (1) The defendant City had full knowledge of petitioner Lyle Chandler's diabetes at the time it hired him for a job that required driving. (2) Mr. Chandler did, in fact, drive on the job for over three years without incident. (3) All medical evidence at trial established that Mr. Chandler's diabetes was well-controlled and that he is capable of driving safely in his employment. See District Court Findings ¶¶ 20, 24-27, 58, 60.

REASONS FOR GRANTING WRIT

A. The Fifth Circuit's "Controlled Condition" Definition of "Handicap" Subverts the Rehabilitation Act and the Americans With Disabilities Act.

The Fifth Circuit adopted a disturbing new approach to the most basic issue in disability law--the definition of "handicap." As its definitional

baseline, the court referred to petitioner's controlled, rather than uncontrolled, disease.

This "as mitigated" definitional approach, which dramatically limits the protections of both the Rehabilitation Act and the Americans With Disabilities Act, must be corrected.

The EEOC's Interpretive Guidance on Title I of the ADA emphasizes: "The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." See 29 CFR Part 1630, Appendix A, section 1630.2(h), citing S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) at 23 (emphasis added).

Thus:

> For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

* * *

> . . . . An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

Id., sections 1630.2(h), 1630.2(j) (emphasis added). Accord Gilbert v. Frank, 949 F.2d 637, 641 (2d Cir. 1991) (plaintiff with kidney cysts was "handicapped" notwithstanding mitigation of impairment through dialysis); Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987) (plaintiff, whose medication controlled her epileptic seizures, was "handicapped" for purposes of Rehabilitation Act).

Consistent with this "uncontrolled" or "unmitigated condition" baseline, in every reported case under the Rehabilitation Act or its state law equivalents involving plaintiffs with

diabetes--except this case--plaintiffs' diabetes was stipulated, presumed, or found to be a handicap. See Appendix "A" (describing ten federal and state cases treating insulin-dependent or insulin-taking diabetes as "handicap"). See generally Bayler, "Dulling A Needle: Analyzing Federal Employment Restrictions on People with Insulin-Dependent Diabetes," 67 Ind. L.J. 1067, 1078-81 (hereinafter "Dulling A Needle") (canvassing decisions applying Rehabilitation Act Section 504 to persons with diabetes).

Thus, the Fifth Circuit's holding presents a substantial inter-circuit conflict--a conflict only this Court can reconcile.

It is tempting to dismiss the Fifth Circuit's "controlled condition" definition as an aberration. But "aberration" or not, its implications are staggering--not only for millions of Americans with diabetes, but for millions more with other conditions that are mitigated or controlled by medicine or

medical devices. See, e.g., Gilbert v. Frank, supra; Reynolds v. Brock, supra.

Indeed, if the Fifth Circuit is correct, the disability statutes are designed to discourage disabled workers from undertaking mitigation measures. In the Fifth Circuit's view, a person who controls his or her diabetes through monitoring, proper diet, and medication, is not covered by the Rehabilitation Act or the ADA, but a person with diabetes who fails to undertake such measures reaps those statutes' protections.[3]

For persons with insulin-dependent diabetes, the Fifth Circuit's message is clear: "If I don't take insulin, I'll die. If I do, I'll lose my job."

---

[3] Uncontroverted medical evidence in the record establishes that: (1) plaintiff Chandler has diabetes mellitus that requires insulin for control; (2) unless properly controlled, such diabetes can result in coma and death; and (3) Mr. Chandler has himself experienced diabetic reactions requiring hospitalization when his disease was out of control. See Tr. Vol. 19 at 6-7, 9-12; District Court Findings ¶ 59.

Congress never intended such a macabre choice. Review should be allowed.

B. The Fifth Circuit's Categorical "Otherwise Qualified" Approach Sanctions Blanket Exclusions of Handicapped Workers.

Even without its erroneous definition of "handicap," the Fifth Circuit's decision commands review. The court, in applying a catagorical "otherwise qualified" analysis, held that persons with insulin-dependent diabetes may, as a class, be excluded from jobs requiring driving. This sort of non-individualized approach, sanctioning blanket exclusions of handicapped workers, is the vice that the Rehabilitation Act and, more recently, the Americans with Disabilities Act were designed to remedy. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

In Arline, this Court generally endorsed the need for individualized inquiries in determining whether

handicapped individuals are "otherwise qualified" for particular jobs:

> [I]n most cases, the district court will need to conduct an individualized inquiry and make the appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

480 U.S. at 287.

Consistent with Arline, the courts in all but one of the other reported cases involving claims by plaintiffs with diabetes under the Rehabilitation Act or its state law equivalents have engaged in individualized "otherwise qualified" inquiries.[4] In some cases, courts have

---

[4] The sole exception is Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), aff'd without opinion, 865 F.2d 592 (3d Cir. 1989) (described in Appendix A).

(continued...)

found particular plaintiffs to be "otherwise qualified";[5] in others,

---

[4](...continued)
There, the court sustained a blanket exclusion of persons with insulin-dependent diabetes from employment as FBI special agents or investigative specialists. See 692 F. Supp. at 517-521. The Davis decision has been severely, and correctly, criticized as failing to address scientific and medical advances which permit rigorous individualized monitoring and control and reasonable accommodation of persons with diabetes. See "Dulling A Needle," supra, 67 Ind. L.J. at 1081-90.

A recent outstanding example of improved medical/scientific understanding of diabetes is the publication of the results of the Diabetes Control and Complications Trial. See DCCT Research Group, "The Effect of Intensive Treatment of Diabetes on the Development and Progression of Long-term Complications in Insulin-dependent Diabetes Mellitus," N. Engl. J. Med. 1993; 329:977-86.

[5] E.g., Com. Dept. of Transp. v. Tinsley, 564 A.2d 286, 288 (Pa. Cmwlth. 1989) (described in Appendix "A") ("DOT's speculation about the possible effects of diabetes is not appropriate. The proper inquiry must be directed to Tinsley herself and the effects of her handicap upon her job performance.") (original

(continued...)

particular plaintiffs have found to be not "otherwise qualified."[6]

---

[5](...continued)
emphasis); Fraser Shipyards, Inc. v. DILHR, 13 FEP Cases 1810 (Wisc. Cir. Ct. 1976) (described in Appendix "A") ("While the petitioner did demonstrate that individual diabetics may be unqualified to fill the position of welder in a shipyard because those persons may have a history of blackouts or may be so severely disabled by the disease as to require precise regularity of schedule, the petitioner made no such showing with respect to these claimants.").

[6] E.g., Serrapica v. City of New York, 708 F. Supp. 64, 73 (S.D.N.Y. 1973) (described in Appendix "A") ("Defendant has demonstrated, based on plaintiff's medical history and current laboratory testing, that the disqualification was based on valid considerations of safe performance of the duties of the job as Sanitation Worker."); Miller v. Sioux Gateway Fire Dept., supra, 497 N.W.2d 838, 842 (Iowa 1993) (described in Appendix "A") ("We find the nature of a firefighter's duties justifies finding that Miller, a diabetic who is not in control of his disease, is not qualified for the firefighter position.") (emphasis added). Accord Barth v. Gelb, 761 F. Supp. 830, 835-36 (D.D.C. 1991), aff'd 2 F.3d 1180 (D.C. Cir. 1993) (described in Appendix "A") (engaging in exacting, individualized review of

(continued...)

The particular results are immaterial. What is material is that the courts have recognized the legal and practical/medical need to examine each worker's individual medical circumstances and work history vis à vis the demands of a particular job. See Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985) ("[A]n employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job."). Accord 29 CFR Part 1630, Appendix A, § 1630.2(r) (in determining whether individual's disability poses a significant risk of substantial harm to others, employer is to engage in individualized determination, including consideration of the handicapped person's experience with

---

[6](...continued)
plaintiff's medical condition and job demands).

his or her disability in previous similar positions).

The present record exemplifies the wisdom of such an individualized inquiry--and the folly of the Fifth Circuit's rationale. It is undisputed that petitioner Chandler drove on the job for years without incident. See District Court Findings, ¶¶ 23, 25-27. Moreover, the overwhelming weight of medical testimony at trial (which the district court accepted) established that because Mr. Chandler's condition was well-controlled, he was capable of driving safely and without increased risk notwithstanding his disease. See District Court Findings, ¶ 58. Finally, and perhaps ironically, the Federal Highway Administration has amended the federal licensing regulation (49 CFR § 391.41(b)) on which the Fifth Circuit premised its categorical, per se approach to allow waivers for insulin-treated commercial drivers who engage in specified monitoring and control measures. See 58 Fed. Reg. 40690 (July 29, 1993).

The Fifth Circuit's categorical "otherwise qualified" analysis is wrong. Wrong for Lyle Chandler. Wrong for millions of other Americans with disabilities who ask only to be judged on their own qualifications.

Review is imperative.

CONCLUSION

For the foregoing reasons, amicus curiae American Diabetes Association supports petitioners' prayer that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED this 25th day of February, 1994.

Rick T. Haselton
Counsel of Record

HAGLUND & KIRTLEY
101 S.W. Main, Suite 1800
Portland, OR 97204
(503) 225-0777

APPENDIX "A"

Reported Federal and State Decisions Treating Insulin-Dependent or Insulin-Taking Diabetes As "Handicap":

- Bentivegna v. Dept. of Labor, 690 F.2d 619, 621 (9th Cir. 1982) (city's termination of employee with insulin-dependent diabetes pursuant to city's control requirement was unlawful; plaintiff's status as a "handicapped person" under the Rehabilitation Act was "not disputed").

- Wood v. Omaha School District, 785 F. Supp. 1441, 1447 (D. Neb. 1992) (school bus drivers with insulin-using ("Type II") diabetes were "handicapped" under Rehabilitation Act; however, sustaining transfer of such drivers to non-driving positions because reasonable accommodation could not be implemented), rev'd on other grounds, 985 F.2d 437 (8th Cir. 1993) ("handicap" disposition not disputed on appeal; remanding "reasonable accommodation" disposition).

- Barth v. Gelb, 761 F. Supp. 830 (D.D.C. 1991) aff'd, 2 F.3d

1180 (D.C. Cir. 1993) (person with insulin-dependent diabetes who applied for job with Voice of America as Foreign Service Specialist was "handicapped individual" under Rehabilitation Act; agency's failure to waive medical clearance requirement did not violate Act's "reasonable accommodation" mandate).

- Serrapica v. City of New York, 708 F. Supp. 64, 73 (S.D.N.Y. 1989) ("Plaintiff's diabetes constitutes a handicap under the [Rehabilitation Act]"; however, concluding that plaintiff was not individually "otherwise qualified" for appointment as city sanitation worker).

- Davis v. Meese, 692 F. Supp. 505, 517 (E.D. Pa. 1988), aff'd without opinion, 865 F.2d 592 (3d Cir. 1989) ("An insulin-dependent diabetic is clearly a 'handicapped person' within the meaning of the Rehabilitation Act"; however, sustaining FBI's policy against employing persons with insulin-dependent diabetes as special agents or investigative specialists on "otherwise qualified" grounds).

- Brown v. County of Genesee, 37 Fair Empl. Prac. Cas. (BNA), 1595, 1596 (W.D. Mich. 1985)

(jail matron applicant who had insulin-dependent diabetes was "handicapped" within meaning of Rehabilitation Act: "Clearly, the fact that plaintiff's diabetic condition caused her to fail the [pre-employment physical] examination indicates that that impairment was treated as one that substantially limited a major life activity, working.").

- Miller v. Sioux Gateway Fire Dept., 497 N.W.2d 838, 841 (Iowa 1993) (firefighter's insulin-dependent diabetes was "disability" within meaning of Iowa Civil Rights Act).

- Com. Dept. of Transp. v. Tinsley, 564 A.2d 286 (Pa. Cmwlth. 1989) (license revocation of school bus driver with insulin-dependent diabetes violated Rehabilitation Act; state did not contest plaintiff's status as "handicapped individual").

- Jackson v. State, 544 A.2d 291, 297-98 (Me. 1988), cert. denied, 491 U.S. 904 (1989) (state's blanket prohibition on licensing persons with insulin-dependent diabetes as school bus drivers violated Rehabilitation Act; state did

not dispute that insulin-dependent diabetes was "handicap" within meaning of Act).

- Fraser Shipyards, Inc. v. DILHR, 13 Fair Emp. Prac. Cases 1809 (Wisc. Cir. Ct. 1976) (employer violated Wisconsin Fair Employment Act in refusing to hire person with insulin-dependent diabetes as welder; insulin-dependent diabetes assumed to be "handicap" within meaning of state act).

(5)

Supreme Court, U.S.
FILED
MAR 14 1994
OFFICE OF THE CLERK

No. 93-1250

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and OTHERS SIMILARLY SITUATED,
Petitioners,

v.

THE CITY OF DALLAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF OF PETITIONERS

GENICE A.G. RABE
Counsel of Record
L.N.D. WELLS, JR.
Suite 1202
600 E. Las Colinas Boulevard
Irving, Texas 75039-5606
(214) 556-2999
Counsel for Petitioners

March 14, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

5 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1250

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and OTHERS SIMILARLY SITUATED,
Petitioners,

v.

THE CITY OF DALLAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF OF PETITIONERS

Petitioners Lyle S. Chandler, Adolphus A. Maddox, and others similarly situated file this their Reply Brief.

The Respondent's Brief in Opposition reflects why this Court should grant review. The Respondent City, like the Fifth Circuit, errs in its statements of the factual record, the claims of the Petitioners, and most importantly the law as found by this Court and other courts of appeals.[1]

---

[1] The Petitioners cannot here review all errors and misstatements made by the City and which largely parallel the errors made by the Fifth Circuit. Only a few of such errors are listed. Other errors are more appropriately raised in a brief on the merits. Petitioners do not waive any errors not discussed here.

I.

The Respondent City of Dallas and the Fifth Circuit state and imply, respectively, that Chandler's insulin controlled diabetes presents a safety risk if he is allowed to drive because of two specific hypoglycemic reactions and alleged other numerous reactions.[2] This statement directly contradicts the district court's factual findings based on undisputed medical evidence that Chandler's diabetes has been well controlled and that he is not a safety risk. The district court specifically noted that the two hypoglycemic reactions resulted from the City's discrimination against Chandler, not a failure of Chandler's medication or of him.[3] The City's actions in allowing Chandler to drive in the same positions from 1982 to 1985 before this suit was filed and again from 1990 to 1992 after trial also belie its statement. If Chandler's diabetes made him a safety risk, the City presumably would not have allowed him to drive. This misstatement of fact is wrong, violates the clearly erroneous rule, and is prejudicial. It impermissibly permeates and colors the Fifth Circuit's decision and the City's Brief.

The City erroneously describes demotions, repeated denials of promotions, discipline, threats of termination, and lost pay and damages exceeding $225,000.00 to petitioners alone as only an "inconvenience" and "temporary" restriction.[4] They are not.

II.

The City incorrectly attempts to characterize the Fifth Circuit's reversal as totally based on findings that the

---

[2] Respondent's Brief in Opposition, pp. 5, 6, and 20; *Chandler v. City of Dallas*, 2 F.3d 1385, 1389 (5th Cir. 1993).

[3] The district court's Findings of Fact and Conclusions of Law (Findings and Conclusions), App. 45a-48a, attached to the Petition for Writ of Certiorari.

[4] Respondent's Brief, pp. 8 and 16.

district court erred in its application of law. According to the law of the case handicap and otherwise qualified status are questions of fact that must be decided by the district court and reviewed by the court of appeals under the clearly erroneous standard.[5] The district court made specific findings that Chandler and Maddox were handicapped and otherwise qualified.[6] No where does the Fifth Circuit hold that the district court erred as to findings of fact or law. It reversed by simply ignoring the district court's detailed findings of credibility, fact, and law.

The City incorrectly cites an unpublished Fifth Circuit opinion, *Collier v. City of Dallas,* No. 86-1010 (5th Cir. Aug. 19, 1986), for the proposition that persons with corrected vision better than 20/200 (Snellen) are not handicapped. *Collier* holds only that the plaintiff, whose corrected vision was agreed by all parties to be 20/30 (Snellen), was not handicapped.

The City and the Fifth Circuit also rely on dicta in *Collier* to argue that unless the City is allowed to discriminate against the handicaped it might be liable for accidents that might involve physically impaired drivers.[7] Neither dicta in an unpublished opinion nor an unsubstantiated fear is sufficient to overcome the statutory bar to discrimination against the handicapped. Even the Fifth Circuit has recognized that "the threat of injury . . . cannot be based on unfounded fears or stereotypes; it must be veritable." *Chiari v. City of League City,* 920 F.2d 311, 317 (5th. 1991).[8] Review is necessary to protect the disabled from discrimination based on prejudice and stereotype.

---

[5] *Chandler v. City of Dallas,* 958 F.2d 85, 90 (5th Cir. 1992).

[6] Findings and Conclusions, App. 34a-37a, 44a-55a, 59a-62a.

[7] Respondent's Brief, p. 22; *Chandler,* 2 F.3d at 1395.

[8] *See also, School Board of Nassau County v. Arline,* 480 U.S. 273, 284-85 (1987); *Mantolete v. Bolger,* 767 F.2d 1416 (9th Cir. 1985; *Bentivegna v. Dep't of Labor,* 694 F.2d 619 (9th Cir. 1982).

Finally, the City makes the "Catch 22" argument that Petitioners have defeated their position that individualized inquiry as to their qualifications is needed by their insistence that they are disabled.[9] If the City is correct, then the disability statutes apply to no one. Any impairment severe enough to substantially limit major life activities makes the employee not otherwise qualified as a matter of law. Besides being nonsense, this assertion directly conflicts with the holdings of this Court and other courts of appeals that a plaintiff may be both handicapped and otherwise qualified. *E.g., Arline,* 480 U.S. 273; *Thornhill v. Marsh,* 866 F.2d 1182 (9th Cir. 1989); *Reynolds v. Brock,* 815 F.2d 571, 573 (9th Cir. 1987).

The attempts of the City and the court of appeals to ignore the findings of fact of the district court and disability discrimination law as found by this Court and other courts of appeals make clear the necessity for review. Without review, millions of persons with disabilities that federal statutes intended to protect from discrimination are left without protection.

CONCLUSION

A writ of certiorari should be issued and the judgment and decision of the court of appeals should be reversed.

Respectfully submitted,

GENICE A.G. RABE
Counsel of Record
L.N.D. WELLS, JR.
Suite 1202
600 E. Las Colinas Boulevard
Irving, Texas 75039-5606
(214) 556-2999
Counsel for Petitioners

March 14, 1994

---

[9] Respondent's Brief, p. 21.